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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioners, Martha R. Moore, William W. Richardson, Jr., Julia R. Corbin, Robert R. Richardson and William R. Ingraham, defendants and additional defendant below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 27, 1957, reversing the judgment of the District Court in favor of petitioners and remanding the case to the District Court with instructions to reinstate the judgments in favor of plaintiff-respondent.

OPINIONS BELOW

The opinion of the District Court (15a-31a)* is reported in 143 F. Supp. 816. The opinion of the Court of Appeals is unreported. Nine additional copies of the opinion of the Court of Appeals have been filed with the Clerk contemporaneously with the filing of this petition. For the convenience of the Court nine additional copies of the appendices have been filed with the Clerk contemporaneously with the filing of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 and is printed in Appendix B hereto infra, p. 34. A timely petition for rehearing was filed with the Court of Appeals on July 11, 1957 and the Court of Appeals denied said petition on August 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Where there is no decision by Pennsylvania's courts on the precise fact situation before a federal court in a diversity action but the State's highest court has crystallized facts comparable and analogous to those of the case at bar into a judicial rule for the determination of whether the relationship between two parties is that

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*Throughout this petition where references are made to the appendices, numbers followed by the letter "a" indicate Appellant's Appendix and numbers followed by the letter "b" indicate Appellees' Appendix. "T" in this petition refers to the typewritten transcript of the trial.

of master and servant or employer and independent contractor, does that State rule govern in the federal court?

In other words, in a diversity case, is the liability of a private hospital for the negligence of a house physician governed by the same rules of State law as apply to all other employers?

2. May a lower federal court, in a diversity case, ignore and disregard the rule of Pennsylvania law laid down by that State's highest court that a release or indemnity "from any damages" or "for any loss" is comprehensive language which covers all liability, including liability for negligence?

3. Where respondent at the trial of the case abandoned the theory of *respondeat superior* because she did not request the trial court, as prescribed by Rule 51, to submit that issue to the jury and instead expressly accepted and acquiesced in a different theory of the case, may the court of appeals review the case upon the abandoned theory when there was no objection, exception or motion to preserve that issue on appeal?

4. Where a federal trial judge, in a diversity case, reaches a reasonable and permissible conclusion upon a question of local law, may a federal court of appeals make a second guess, to substitute its guess as to what the local law might be?

5. Where a partnership, under applicable state law, is a juristic entity and a party to a suit against some of the individual partners and the partnership's only place of business is in the state of which plaintiff is a citizen, does a federal court lack jurisdiction in a diversity case against the nonresident partners because there is no diversity of citizenship?

STATUTES INVOLVED

The statutory provisions involved are: the Rules of Decision Act, 28 U. S. C. § 1652; Section 1 of the Pennsylvania Act of 1911, P. L. 639, as amended, 63 P. S. § 401a; and 28 U. S. C. § 1332(a)(1). They are printed in Appendix A, infra, pp. 32-33.

STATEMENT

This was a civil action brought in the District Court by respondent, as executrix of her husband's estate, under the Pennsylvania Wrongful Death Act and Pennsylvania Survival Act, to recover damages for her husband's death caused by the negligent medical care given to decedent by Dr. John L. Kelly, the Medical Director or house physician of Mercer Sanitarium while decedent was a patient there for care and treatment of a mental disorder. Petitioners were partners in the operation of the Sanitarium. The verdict of the jury establishes that respondent's husband died as the result of Dr. Kelly's malpractice. The jurisdiction of the District Court was invoked on the basis of diversity of citizenship and jurisdictional amount under 28 U. S. C. § 1332.

As the District Court observed (18a): "The facts relating to the employment of Dr. Kelly were proved by [respondent] and are not in dispute." The undisputed evidence produced by respondent established that petitioners employed Dr. Kelly as Medical Director of the Sanitarium at an annual salary and placed him, as a skilled professional man, in charge of diagnoses and treatment of patients on the understanding that he was to function according to his own personal judgment,

learning and skill. It was not shown at the trial that petitioners had any control or right to control Dr. Kelly in the performance of his professional duties. *Instead, respondent affirmatively proved by uncontradicted testimony that petitioners had no control or right of control over Dr. Kelly in the discharge of his professional duties to Brown and other patients* (16a-17a, 22a, 3b, 4b, 7b, 8b, 13b, 18b, 22b,-23b, 24b).

Petitioners, at the close of respondent's evidence, moved to dismiss under Rule 50(a) (22a; T. 422-426, 426-427). The District Court, at that time and at all times thereafter, was of the opinion and ruled that, under the evidence and the law of Pennsylvania, Dr. Kelly was an independent contractor and that petitioners were not liable for his malpractice under the doctrine of *respondeat superior* (22a; T. 430, 433, 435, 653). Notwithstanding that conclusion and ruling, the District Court did not grant the motions to dismiss or direct a verdict at that time and instead submitted the case to the jury on the theory that by reason of the hospital-patient relationship petitioners impliedly agreed to furnish respondent's husband proper medical care and treatment, from which agreement arose a nondelegable duty to do so and that a tortious breach thereof by petitioners' house physician would cast vicarious liability upon them (22a; T. 703-706). The District Court did not submit the case to the jury on the theory of *respondeat superior* nor instruct the jury to determine whether Dr. Kelly was acting as servant or independent contractor in the discharge of his professional duties at the Sanitarium (T. 426, 430, 435, 674). The jury was only instructed to find whether Dr. Kelly was negligent in the medical care and treatment afforded respondent's husband or not and, if they found

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that he was, to return a verdict for respondent in each action (T. 705-706).

Petitioners filed a motion, under Rule 50(b), for directed verdict (28b) and also took exceptions, under Rule 51, to the charge of the District Court (T. 726-728, 733-734, 735-736).

Respondent did not file a written request with the trial court to submit the case to the jury on the doctrine of *respondeat superior* or to instruct the jury to find whether or not Dr. Kelly was a servant of the Sanitarium nor did she object to the failure to do so, as required under the provisions of Rule 51. In fact, when invited by the Trial Judge, at the conclusion of the charge, to object or except, respondent's counsel said (T. 739):

> "If the Court please, I want to sincerely congratulate this Court on the charge given in this case. *We have no complaints about it.* . . . it covers the whole situation and is as clear, concise, and lucid as possible under the circumstances." (Emphasis supplied).

The jury found that the death of respondent's husband was caused by the malpractice of Dr. Kelly and returned a verdict for respondent in each action (11a). The District Court entered judgments in accordance with the verdicts (11a-12a). Petitioners thereafter filed a motion to set aside the verdicts and judgments in favor of respondent and to enter judgment for petitioners in accordance with the motion for directed verdict (13a, 29b-34b).

The District Court set aside the judgments for respondent entered on the verdicts and entered judgment

for petitioners in accordance with the motions for directed verdict because: (1) the evidence showed that petitioners had no control or right to control Dr. Kelly in the performance of his professional duties and, under the fundamental rule in Pennsylvania, he was an independent contractor in the medical care and treatment given patients, and petitioners were not liable for his negligence in the care and treatment of patients (19a-22a, 24a, 26a); and (2) after considering "all the available data", when no conclusive state authority was found on the precise facts, including the strong indicia that the appellate courts of Pennsylvania are extremely reluctant to extend the doctrine of nondelegable duty to liability for negligence beyond the point where personal supervision and judgment must in the very nature of the case end, the District Court was of the opinion "that the law of Pennsylvania does not presently cast a non-delegable duty to care for and treat patients upon the owners of a private sanitarium for profit" (23a-26a).

The Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded the cause with direction to reinstate the judgments in favor of respondent, because in its opinion the Supreme Court of Pennsylvania might hold that the doctrine of *respondeat superior* was applicable under the precise facts of this case as evaluated by the Court of Appeals. The Court of Appeals did not rest its decision upon the theory on which the case was tried below, that is, the theory of a nondelegable duty to provide proper medical care and treatment to a patient arising out of the hospital-patient relationship.

The Court of Appeals also held that a release signed by respondent and her husband releasing the Sanitarium

"from any damages" on account of "any form of recognized medical treatment" administered to the husband as deemed advisable by the Medical Staff of the Sanitarium did not apply to any injury caused by treatment of any kind other than that given to him as a neurotic (p. 16). The Court of Appeals further held that an agreement signed by respondent "to indemnify" the Sanitarium "for any loss resulting from injury to" respondent's husband "in no wise expresses in unequivocal terms an intent or purpose on the part of [respondent] to indemnify [petitioners] for loss resulting from the negligence of Dr. Kelly or the Sanitarium staff" (p. 18). The District Court, since it found that under Pennsylvania law the petitioners were not responsible for the physician's malpractice, did not reach the question of the release and indemnity agreements.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court of Appeals, in formulating the applicable local law in a diversity action instead of merely ascertaining and applying it in the light of the common law of the state, failed to apply the doctrine established by the decisions of this Court in Erie R. Co. v. Tompkins,* 304 U. S. 64, *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, *and West v. American Telephone & Telegraph Co.,* 311 U. S. 223. *The decision is also in conflict with the decision of the Court of Appeals for the First Circuit in Boston Casualty Co. v. Bath Iron Works Corporation,* 136 F. 2d 31, *the decision of the Court of Appeals for the Third Circuit in Venuto v. Robinson,* 118 F. 2d 679, *and the decision of the Court of Appeals for the Eighth Circuit in Elder v. Dixie Greyhound Lines,* 158 F. 2d 200. It presents an important question in federal-state relationship and under the Rules of Decision Act.[1]

In *Erie R. Co. v. Tompkins,* 304 U. S. 64, 78, this Court overruled *Swift v. Tyson,* 16 Pet. 1, and held that in diversity actions the law to be applied in the determination of the substantive rights of the parties is the law of the State, whether declared by its Legislature in a statute or by its highest court in a decision.

In *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 209, and *West v. American Telephone & Telegraph Co.,* 311 U. S. 223, 237, this Court outlined the procedure to be followed in the application of the "State law" to a controversy controlled by Erie. In the *West* case, *supra* at 237, this Court said:

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1. 28 U. S. C. § 1652.

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In this case the question before the District Court at the conclusion of the respondent's case was whether a physician is the servant of a private hospital which employs him as house physician in the discharge of his professional duties. Admittedly, there is no Pennsylvania case which has dealt with the precise facts involved in the instant case. Accordingly, the District Court, adhering to the mandate of this Court, correctly referred, under the record as made out by the respondent and therefore binding upon her under Pennsylvania law,[2] to the common law of Pennsylvania applicable generally in the determination of the question as to whether the relationship between two parties is that of master and servant or employer and independent contractor. That general rule in Pennsylvania is that the relation of master and servant exists only when the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished and where the principal does not have actual or potential control of the means and methods by which the employee transacts the business, the employee is an

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2. *Conley v. Mervis*, 324 Pa. 577, 586, 188 A. 350; *Kline v. Kachmar*, 360 Pa. 396, 402, 61 A. 2d 825; *Karcesky v. Laria*, 382 Pa. 227, 230, 114 A. 2d 150.

independent contractor and the doctrine of *respondeat superior* does not apply. It suffices to cite some of the host of Pennsylvania decisions which have applied these principles to situations comparable to the case at bar.[3] As the District Court well summarized the Pennsylvania law (19a): "Control or potential control over the servant seems to be the essence of liability." The District Court then ruled (22a) that since respondent had not shown that petitioners had any control or right to control Dr. Kelly in the performance of his professional duties to respondent's husband, Dr. Kelly was an independent contractor and under the law of Pennsylvania petitioners were not liable for his malpractice since they had exercised reasonable care in selecting him.[4]

The District Court followed the procedure laid down for it by the Court of Appeals for the Third Circuit in

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3. *Long v. Eastern Paving Co.*, 295 Pa. 163, 166, 145 A. 71; *Silveus v. Grossman*, 307 Pa. 272, 277-278, 161 A. 362; *Fuller v. Palazzolo*, 329 Pa. 93, 105-106, 197 A. 225; *Doerr v. Rand's*, 340 Pa. 183, 186, 16 A. 2d 377; *Joseph v. United Workers Ass'n*, 343 Pa. 636, 638-639, 23 A. 2d 470; *Feller v. New Amsterdam Casualty Co.*, 363 Pa. 483, 486, 70A. 2d 299; *Murrin v. Rifugiato*, 373 Pa. 561, 563-564, 96 A. 2d 865; *Ragano v. Socony Vacuum Oil Co.*, 376 Pa. 271, 274, 101 A. 2d 686; *Townsend v. Pittsburgh*, 383 Pa. 453, 457, 119 A. 2d 227.

4. This Court has repeatedly sustained the right of the trial courts to instruct juries and direct verdicts on a theory if the evidence is insufficient to sustain a verdict thereon: *Pleasants v. Fant*, 22 Wall. 116, 121; *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 369, 384; *Galloway v. United States*, 319 U. S. 372, 389, 394. The Supreme Court of Pennsylvania has enunciated a similar rule: *Knight v. Gulf Refining Co.*, 311 Pa. 357, 361, 166 A. 880; *Marlowe v. Travelers Ins. Co.*, 313 Pa. 430, 433, 169 A. 100.

Venuto v. Robinson, 118 F. 2d 679, 681-682, when Judge Goodrich said:

> "Ordinarily, the problem of determining, upon evidentiary facts whether the relationship between two parties is that of master and servant or employer and independent contractor is one to be answered by the triers of the facts. Restatement, Agency § 220. But here, as in many other places in the law, answers to the fact questions have been crystallized through judicial determination. If facts comparable to those in this case have been crystallized into judicial rule in New Jersey, that rule governs in the federal court. Compare Stoner v. New York Life Ins. Co., 1940, 61 S. Ct. 336, 85 L. Ed.—.
>
> "The problem then becomes one of fact matching of various decisions to see whether a set of facts under consideration is covered by the adjudicated cases. Obviously, the problem is, in most instances, a matter of judgment for an exact duplication of one piece of litigation by another is never found. But an examination of New Jersey decisions convinces us that, in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the courts have held the relationship between the parties to be that of employer and independent contractor. . . . It follows, therefore, that the trial court was in error in failing to give the binding instructions on this point requested by the defendant."

The same rule was laid down in *Boston Casualty Co. v. Bath Iron Works Corp.*, 136 F. 2d 31, 33, where the Court of Appeals for the First Circuit said:

"Our only inquiry under the rule laid down in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, is to determine whether a cause of action is stated under Maine law. It has been urged upon us that the Supreme Judicial Court of Maine has never decided the precise issue before us and that, therefore, we are free to determine this question in the first instance. While it is true that this court may in a proper case be called upon to determine what the local law is, there being no decided cases in point, New England Mutual Life Insurance Co. v. Mitchell, 4 Cir., 1941, 118 F. 2d 414, certiorari denied 314 U.S. 629, 62 S.Ct. 60, 86 L.Ed. 505; Venuto v. Robinson, 3 Cir., 1941, 118 F. 2d 679, nevertheless, when it is clear from the decisions of the state court what the law is, we are not at liberty to establish a new rule because we are of the opinion that it is sounder or of more general application, West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956; Yoder v. Nu-Enamel Corporation, 8 Cir., 1941, 117 F.2d 488. As was well said in the Yoder case, supra, page 489 of 117 F.2d: '* * * The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

The duty of a lower federal court in circumstances similar to the case at bar was set forth as follows by the

Court of Appeals for the Eighth Circuit in *Elder v. Dixie Greyhound Lines*, 158 F. 2d 200, 202:

> "On this appeal the numerous decisions of the courts of Missouri establishing and defining the doctrine of respondeat superior in tort cases in that state have been cited and considered. The parties present no dispute as to general principles governing the question of the master's liability for torts of his servant and the limits to such liability. But hardly any one of the many cases passed on is exactly like another, and the duty of the federal trial court in such a case as this is to compare the proof in the case before it with that in the authoritative analogous cases which have been passed on in the state, and to follow the state law in its decision."

One might have expected that the Court of Appeals, since it recognized (pp. 5-6) that there was evidence that petitioners had no control of Dr. Kelly in the performance of his professional duties and its attention was called, in the opinion of the District Court and petitioners' brief, to the multitude of Pennsylvania cases holding that the element of control is the crucial element in the determination of whether the relationship between two parties is that of master and servant or employer and independent contractor, would have matched the facts in the instant case to those of the State decisions to see whether the set of facts under consideration were covered by the adjudicated cases and compared the proof in the case before it with that in the authoritative analogous State cases. But no, the Court shrank from its duty to seek out and apply the State law and instead, merely because there was no State decision on the precise

facts of the instant case, ignored the rules of law as apply to all other employers in Pennsylvania and based its decision on dicta or upon speculation as to what the local court might decide in light of dicta if faced with a fact situation similar to that which the Court of Appeals, but not the District Court, thought was involved in this case. Other courts of appeal that have considered the problem have concluded that the responsibility of the federal courts, in matters of local law in like situations, is not to formulate the State law, but merely to ascertain and apply it in the light of the State's common law: *New England Mut. Life Ins. Co. v. Mitchell,* 118 F. 2d 414, 420, *cert. den.* 314 U. S. 629, and cases cited *supra.*

An examination of the Pennsylvania decisions plainly demonstrates that in situations where the facts establishing the independent contractor relationship were weaker than in the instant case, the Supreme Court of Pennsylvania has held the relationship to be that of employer and independent contractor. In the instant case there is positive testimony that Dr. Kelly was not subject to control by petitioners in the discharge of his professional duties and that he would not have stood for any such control or supervision. Further, there is inherent in the independent nature and character of the medical profession and the State laws regulating the practice of the profession the inference that petitioners did not have any control or potential control of Dr. Kelly in the practice of medicine. In the absence of overwhelming evidence that petitioners exercised such control, no court may infer any exercise of such control and any concomitant unlawful conduct by petitioners.

The fact that Dr. Kelly was paid a salary by petitioners, which seemingly is stressed by the Court of Ap-

peals, while it ignored the facts of no control of Dr. Kelly by petitioners and the independent calling of a physician, under Pennsylvania law, is not a material factor and does not destroy the independent character of the employment.[5]

Another settled rule of Pennsylvania law which was ignored by the Court of Appeals in arriving at its decision is the rule that an employer who, under law, is required, as a condition precedent to the operation of his business, to employ certain licensed personnel over whom he cannot, under law, exercise any control in the performance of their duties, is not liable for the torts of such licensed persons: *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 199, 201, 203, 33 A. 239. A perusal of the applicable statutory law of Pennsylvania and the evidence in this case (19b) makes it abundantly clear that petitioners were required to place a qualified physician in charge of patients at the Sanitarium and that such physician in medical matters was required to act on his own best judgment and could not permit others not licensed to unlawfully practice medicine through him.[6]

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5. *Harrison v. Collins*, 86 Pa. 153, 159; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 192; *Karl v. Juniata County*, 206 Pa. 633, 640, 56 A. 78; *Feller v. New Amsterdam Casualty Co., supra; Tyler v. McFadden Newspaper Corp.*, 107 Pa. Superior Ct. 166, 174, 163 A. 79; *Sechrist v. Kurtz Bros.*, 147 Pa. Superior Ct. 214, 219, 24 A. 2d 128; *Blum Unemployment Compensation Case*, 163 Pa. Superior Ct. 271, 276, 60 A. 2d 568.

6. Act of 1911, P. L. 639 § 1, as amended, 63 P. S. § 401(a); Mental Health Act of 1923 P. L. 998, § 201; *State Bd. of Medical Ed. & Licensure v. Ferry*, 172 Pa. Superior Ct. 372, 378-379, 94 A. 2d 121.

We respectfully submit that the Court of Appeals, under the doctrine laid down by this Court, should have ascertained the controlling State law from the common law of Pennsylvania set forth above and determined the liability of petitioners by the same rules of law as apply to all other employers in Pennsylvania.

The Court of Appeals, we submit, also erred in its second alternative conclusion (p. 11) that the Supreme Court of Pennsylvania might apply the doctrine of *respondeat superior* and hold the petitioners liable for the physician's malpractice where there has been a holding out or a representation to a patient or his family, as members of the public, that medical treatment is to be administered in a private hospital by a doctor employed therein. First, that theory was never mentioned at trial and the instant case was not tried on any such theory (25a). Second, there is no evidence of any such representation by petitioners. Third, that question was never submitted to the jury and the jury never found that petitioners represented they would furnish respondent's husband reasonably skillful medical care and treatment through Dr. Kelly. Fourth, if there were any presumption or inference along the lines suggested by the Court of Appeals from the surrounding circumstances, which we strenuously deny, under Pennsylvania law,[7] it was wholly lost when respondent produced affirmative testimony by her own witness that Dr. Kelly was not under the control of petitioners but was an independent contractor. Fifth, as the District Court observed (25a), in

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7. *Felski v. Zeidman*, 281 Pa. 419, 421-422, 126 A. 794; *Midora v. Alfieri*, 341 Pa. 27, 30-31, 17 A. 2d 873; *Kunkel v. Vogt*, 354 Pa. 279, 281-282, 47 A. 2d 195; *Hertz v. Record Pub. Co.*, 219 F. 2d 397, 399 (C. C. A. 3).

view of the Pennsylvania statute prohibiting the practice of medicine without a license, respondent and her husband could not have accepted the professional medical services of Dr. Kelly in the reasonable belief that he, while rendering them, was a servant of petitioners. Sixth, under the law of Pennsylvania, where one engages a contractor, especially in a learned or technical field, to perform a job, the employer is entitled to rely on the knowledge and skill of the contractor to whom the task has been entrusted and the responsibility for any harm caused to another thereby is that of the contractor and not of the employer.[8]

Respondent and her husband, when the latter was admitted into the Sanitarium, signed a release reading as follows (27b):

> "The undersigned does hereby give THE MERCER SANITARIUM permission to administer any form of recognized medical treatment, including Electro-Shock Therapy, to George R. Brown which is deemed advisable by the Medical Staff of said Sanitarium, and does hereby release THE MERCER SANITARIUM and its employees from any damages on this account."

At the same time respondent executed a written agreement which reads, in part, as follows (27b):

> "I agree to indemnify THE MERCER SANITARIUM for any loss resulting from injury to, or injury or damage caused by George R. Brown while a patient of Dr. J. L. Kelly and the said Sanitarium herein mentioned."

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8. *Silveus v. Grossman*, 307 Pa. 272, 277-278, 161 A. 362; *Doerr v. Rand's*, 340 Pa. 183, 186, 16 A. 2d 377; *Townsend v. Pittsburgh*, 383 Pa. 453, 457, 119 A. 2d 227.

The Court of Appeals avoids the release by interpreting it (p. 16) to mean that it "was to relieve the Sanitarium of liability for any injury resulting to Brown from his treatment as a neurotic at the Sanitarium", that is, from electro-shock therapy or treatment of a similar nature but not from injury from any other kind of medical treatment. The Court of Appeals refers to no Pennsylvania law to support its narrow interpretation which plainly is contrary to the clear, emphatic and comprehensive language of the release, that the permission is to administer "*any* form of recognized medical treatment, including Electro-Shock Therapy" and the release is from "*any* damages on this account." The Court of Appeals, in arriving at its interpretation, gave no effect to and ignored the rule of Pennsylvania law that a release from "*any*" or "all" damages is clear, precise, unequivocal and comprehensive language which includes everything and excludes nothing and is broad enough to cover liability for negligence.[9] It is manifest from a

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9. In *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. 281, 287, it was held that "any damages" means "all damages". In *Cannon v. Bresch*, 307 Pa. 31, 34, 160 A. 692, it was held that a release "from any and all damage" from certain causes covered damages from acts of active negligence. Also see: *Glen Alden Coal Co. v. Scranton*, 282 Pa. 45, 48-49, 127 A. 307, and *Harper v. Consolidated Rubber Co.*, 284 Pa. 444, 453, 131 A. 356, that "*any*" is a broad and comprehensive term which generally means *all*. In *Pennsylvania L. R. B. v. Rooney*, 389 Pa. 587, 591, 133 A. 2d 533, the Court said: "In *Commonwealth v. One 1939 Cadillac Sedan*, 158 Pa. Superior Ct. 392, 396, 45 A. 2d 406, construing an Act of Assembly, the Superior Court declared that '*a more comprehensive word than "any" could hardly be employed.* It means indiscriminate, or without limitation or restriction.'" (Emphasis supplied).

perusal of the opinion of the Court of Appeals that it made no effort to ascertain and apply the Pennsylvania law in the interpretation of the release.

The Court of Appeals disposes (p. 18) of the indemnity agreement signed by respondent on the ground that it "in no wise expresses in unequivocal terms an intent or purpose on the part of [respondent] to indemnify [petitioners] for loss resulting from the negligence or malpractice of Dr. Kelly." The Court of Appeals cites, in support of its decision, three Pennsylvania cases enunciating the fundamental rule, with which we have no quarrel, that in the absence of a clear expression of intent to the contrary, a contract of indemnity will not be construed to indemnify against the negligence of the indemnitee. But the language of this indemnity is "for *any* loss resulting from injury to" respondent's husband "while a patient of Dr. Kelly and the said Sanitarium." The Pennsylvania appellate courts have held that a provision in a lease relieving the landlord "from all liability for any and all damages caused by water" *(Cannon v. Bresch, supra)*, a provision in a lease "to pay all damages to persons or property upon the demised premises and to save [indemnitee] harmless therefrom" *(Tidewater Field Warehouses, Inc. v. Whitaker Co.*, 370 Pa. 538, 541-542, 88 A. 2d 796), and a provision in a lease that "lessor shall not be liable for any injury or damage from any cause whatever" to tenant and others *(Wright v. Sterling Land Co.*, 157 Pa. Superior Ct. 625, 628-629, 43 A. 2d 614, allocatur refused by the Supreme Court of Pennsylvania, 158 Pa. Superior Ct. xxv), is clear, precise, unequivocal and comprehensive language, broad enough to cover liability for negligence of the indemnitee. Again, it is plain that the Court of Appeals in the interpreta-

tion of the indemnity agreement did not ascertain and apply the applicable State Law[10] as it was its duty to do under the doctrine of *Erie*.

The Court of Appeals plainly misinterprets the rule of *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, for that decision of this Court does not hold that in the absence of a state decision on the precise facts, the lower federal courts are free to determine the state law in accordance with what their opinion is as to what the local court might do in the precisely same fact situation. What occurred in the *Fidelity* case was that the Court of Appeals for the Third Circuit took the view, in reversing the judgment of a district court, that it was not bound by any pronouncements other than those of the state court of last resort, and this Court reversed the Court of Appeals and affirmed the District Court holding that decisions of the Court of Chancery of New Jersey were entitled to respect as announcing the law of the state and that the federal court was not at liberty to reject them because it did not agree with their reasoning. The *Fidelity* case, we submit, supports petitioners' contention that the Court of Appeals in this case was not free to reject and ignore, in a private hospital-house physician situation, the Pennsylvania law generally governing employers in Pennsylvania because it did not like the result which follows therefrom in the instant case.

It is clear that the Court of Appeals, seemingly because of a deep sympathy for the victims of the hazards of negligence, was unwilling in this case to follow the governing rules under the Rules of Decision Act as laid down by this Court and to ascertain and apply the con-

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10. See footnote 9, supra.

trolling State law of Pennsylvania as enunciated in analogous and comparable situations in decisions of Pennsylvania's highest court. Doctrines must be enforced to be respected. If they are merely left as something on paper, because this Court will not review even as flagrant a violation as the one in the instant case, they might as well be written on water. If the decision of the Court of Appeals in the case at bar is sound, then surely "the ghost of *Swift v. Tyson, supra,* still walks abroad, somewhat shrunken in size, yet capable of much mischief:" *Sampson v. Channell,* 110 F. 2d 754, 761 (C. C. A. 1).

2. *The Court of Appeals erred in disregarding the provisions of Rule 51 and the rule as to scope of review on appeal applicable in the federal courts. This departure of the Court of Appeals from accepted and usual course of judicial proceeding calls for the exercise of this Court's power of supervision.*

Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides:

> "At the close of the evidence, . . , any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This Rule has the force of law and is, in substance, the rule which has always prevailed in the federal courts.

Where, as here, a party files no written request with the trial judge to instruct with respect to a certain theory

nor objects to the failure of the trial judge to give such instructions, that party, on appeal, is precluded from assigning such failure as error. The theory on which a case is tried nisi, with the consent and acquiescence of appellant, is the theory on which it must, on appeal, be weighed for error. Even if an appellant is entitled to have his case submitted to the jury on a theory more favorable to him than that embodied in the instructions, there can be no reversal of the judgment upon such theory where appellant failed to preserve that theory for appeal, by requests for instructions or objections to the instructions given.[11]

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11. *United States v. Southmayd,* 9 How. 637, 646; *Peck v. Henrich,* 167 U. S. 624, 629; *Louisville & Nashville R. Co. v. Parker,* 242 U. S. 13, 135; *Pennsylvania R. Co. v. Minds,* 250 U. S. 368, 375; *Virginian Ry. Co. v. Mullens,* 271 U. S. 220, 227-228; *Helvering v. Wood,* 309 U. S. 344, 349; *Edwards Mfg. Co. v. Bradford Co.,* 294 F. 176, 180 (C. C. A. 2); *Arkansas Anthracite Coal & Land Co. v. Stokes,* 2 F. 2d 511, 518 (C. C. A. 8); *Sacramento Sub. Fruit Lands Co. v. Melin,* 36 F. 2d 907, 909 (C. C. A. 9); *New York Life Ins. Co. v. Calhoun,* 114 F. 2d 526, 543 (C. C. A. 8), cert. den. 311 U. S. 701; *Reidy v. Mynitti,* 116 F. 2d 725, 729 (C. C. A. 9); *Ramming R. E. Co. v. United States,* 122 F. 2d 892, 893-894 (C. C. A. 8); *Mill Owners Mut. Fire Ins. Co. v. Kelly,* 141 F. 2d 763, 766 (C. C. A. 8); *Cafasso v. Pennsylvania R. Co.,* 169 F. 2d 451, 454 (C. A. 3); *Stilwell v. Hertz Drivurself Stations,* 174 F. 2d 714, 715 (C. A. 3, defense of Statute of Limitations though plead and plainly a good defense to a substantial part of plaintiff's claim not considered on appeal since not preserved under Rule 51); *Moore v. Waring,* 200 F. 2d 491, 492 (C. A. 2); *Lively v. Elkhorn Coal Co.,* 206 F. 2d 396, 399 (C. A. 6, where one of plaintiff's theories of recovery not submitted by trial judge because in his opinion evidence was insufficient to sustain it, held question of that theory not before court on review, since plaintiff had not complied with Rule 51); *Board of Commissioners v. Smyth,* 187 F. 2d 11, 12 (C. A. 5), cert. den. 342 U. S. 821; *Comins v. Scrivener,* 214 F. 2d 810, 815 (C. A. 10).

Since respondent at no time during the trial of this case filed a written request that the District Court instruct the jury on her theory that Dr. Kelly was the servant of petitioners and they, therefore, liable for his malpractice and instead, consented and acquiesced to the submission of the case on the theory of a non-delegable duty implied from the hospital-patient relationship, the former theory was not before the Court of Appeals for review and the judgment of the District Court should not have been reversed on the basis of that theory.

3. *The decision of the Court of Appeals overruling a reasonable and permissible conclusion of the District Court upon a doubtful question of local law is in conflict with decisions of the Courts of Appeals for the Eighth, Ninth and Tenth Circuits.*

In *Russell v. Turner*, 148 F. 2d 562, 564 (C. C. A. 8); *Heikes v. New York Life Ins. Co.*, 171 F. 2d 460, 464 (C. A. 8); *Mast v. Illinois Central R. Co.*, 176 F. 2d 157, 163 (C. A. 8); *Northern Liquid Gas Co. v. Hildreth*, 180 F. 2d 330, 336 (C. A. 8); *Mitton v. Granite State Fire Ins. Co.*, 196 F. 2d 988, 992 (C. A. 10); *People v. United States*, 235 F. 2d 647, 654 (C. A. 9); and *Warner v. First Nat. Bank*, 236 F. 2d 853, 860 (C. A. 8), the Courts of Appeals for the Eighth, Ninth and Tenth Circuits have laid down the salutory rule that if a federal district judge has reached a permissible conclusion upon a doubtful question of local law, a court of appeals will not overrule him even though it may think the law should be otherwise. The Courts of Appeals in these Circuits have said that all that a Court of Appeals should do in reviewing cases governed by

state law is to see that the determination of the District Court is not induced by a clear misconception or misapplication of law.

This approach is well-stated in *Russell v. Turner, supra,* thusly (p. 564):

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error. Magill v. Travelers Ins. Co., 8 Cir., 133 F. 2d 709, 713; Roth v. Swanson, 8 Cir., 145 F. 2d 262, 266, 268; Doering v. Buechler, 8 Cir., 146 F. 2d 784, 788; Railway Mail Ass'n v. Chamberlin, 8 Cir., 148 F. 2d 206. This does not mean that an appellant, in order to obtain a reversal of a judgment in a case such as this, must demonstrate error to a mathematical certainty, but it does mean that this court will not overrule a decision of a trial judge upon a question of state law except for cogent and convincing reasons. Compare Yoder v. Nu-Enamel Corporation, 8 Cir., 145 F. 2d 420, 423-425; Roth v. Swanson, supra, page 269 of 145 F. 2d; Anderson v. Sanderson & Porter, 8 Cir., 146 F. 2d 58, 62. All that this court reasonably can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the law."

Assuming *arguendo*, that the question of local law involved in this case was doubtful, which we unequivocally deny, a perusal of the opinion of the Court of Appeals demonstrates that that Court recognized that

the District Court reached a permissible conclusion on that question of local law for, *inter alia*, the Court of Appeals admitted (pp. 6-7) that the determination of the District Court that Dr. Kelly was an independent contractor and petitioners were not liable for his malpractice has support "in the law of some States, perhaps of a majority", and (p. 9) that in Pennsylvania, which goes further than most states in the protection of employers of independent contractors, it is the law that an employer of an independent contractor is not liable for the latter's negligence if the contractor was selected with due care and that there is a presumption under Pennsylvania law he was so selected. *Nowhere did the Court of Appeals suggest or even intimate that the District Court's decision was premised on a clear misconception or misapplication of Pennsylvania law.* Accordingly, the Court of Appeals should not have overruled the District Court, to substitute its opinion of what the Supreme Court of Pennsylvania might do under the precise facts of this case, not as found by the Trial Judge but as viewed by the Court of Appeals.

Since decisions of the federal courts on questions of state law are mere *ad hoc* pronouncements which perforce must fall before the first adverse pronouncement of the state appellate courts and the federal courts should be reluctant to extend undefined frontiers of state law, we submit the rule followed in the Eighth, Ninth and Tenth Circuits is the sensible and proper approach and should be adopted by this Court as the rule to be followed throughout the Federal Judicial System.

4. *Courts below erred in failing to dismiss the instant case for lack of jurisdiction since there was no diversity of citizenship between plaintiff and all of the defendants.*

It is a well-settled rule that federal courts do not have jurisdiction on the ground of diversity of citizenship, unless that diversity exists between all of the plaintiffs, on the one hand, and all of the defendants, on the other hand, at the time suit was instituted: *Strawbridge v. Curtiss,* 3 Cranch 267.

In recent times, the law has developed the concept of a partnership as a jural entity, separate and distinct from its members. This jural entity concept has been adopted in Pennsylvania: Pennsylvania Uniform Partnership Act of 1915 P. L. 18, 59 P. S. § 1, *et seq.;* Rule 2128(a) of the Pennsylvania Rules of Civil Procedure; 2 Goodrich-Amram, *Civil Practice,* § 2128(a)-1.

It was held by a District Court sitting in Pennsylvania within the Third Circuit, on the basis of the jural entity concept, that a partnership is a citizen and resident of the state of its principal place of business. This decision was followed by a District Court sitting in Vermont within the Second Circuit.

In *Darby v. Philadelphia Transp. Co.,* 73 F. Supp. 522 (E.D. Pa.), the plaintiff, a citizen of South Carolina, brought an action in a federal district court in Pennsylvania against the defendant corporation, a citizen of Pennsylvania, and two individual defendants, citizens of Pennsylvania, and a third individual defendant, a citizen of Delaware, individually and trading in a firm name, as a partnership. The partnership had its prin-

cipal place of business in Pennsylvania. A motion to dismiss was filed on the ground, *inter alia*, that the venue was improperly laid. The defendants in that case contended that a partnership has no citizenship independent of its members and that since one of them was a citizen and resident of Delaware and invoked her privilege of venue, the complaint had to be dismissed. The Court denied the motion to dismiss, saying (p. 523):

> "In connection therewith Rule 17 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, makes the capacity of a defendant to sue or be sued, determined by the law of the state wherein the federal court is located. Busby v. Electric Utilities Employees Union, 323 U.S. 72, 65 S.Ct. 142, 89 L. Ed. 78; Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 7 Cir., 152 F. 2d 493. Accordingly, resort is then had to Rule 2128(a) of the Pennsylvania Rules of Civil Procedure, 12 P.S. Appendix, wherein the plaintiff has the option of naming any of the members of a partnership, or the partnership entity, as the defendant, or may join any combination of partners and the partnership entity as defendants, the partnership itself being recognized as an entity, separate and distinct from its members. In re Julian D.C.M.D. Pa. 22 F. Supp. 97. *Therefore it is apparent that for the purpose of suit in a federal court a partnership has a jural entity.*" (Emphasis supplied).

In *Remington's Dairy v. Rutland Ry. Corp.*, 15 F.R.D. 489, 20 F.R.S. 251 (D. Vt.), the plaintiff was a partnership whose principal place of business was

in Rhode Island. A motion to dismiss was filed on the ground, *inter alia,* that the complaint failed to show diversity of citizenship of the parties. The Court, in denying the motion to dismiss, said:

> "It seems a settled rule that—as far as diversity is concerned—a partnership will be deemed to be a resident of the district wherein it has its principal place of business."

The proper ascertainment of the jurisdictional question is not to be determined by any mechanics of plaintiff's pleadings but rather by the actual facts established by the record: *Indianapolis v. Chase National Bank,* 314 U. S. 63, 69-70.

Turning to the actualities of this litigation, it clearly appears from a perusal of the complaint, as amended, that the four individual defendants were sued as partners. The Court of Appeals recognized that the District Court correctly concluded that defendants were partners together with the additional defendant in the operation of the Sanitarium (p. 5). In fact, paragraph 3A of the complaint recites that defendants "were registered" under the applicable Pennsylvania statute "to do business as Mercer Sanitarium" and thereafter the complaint refers to the "Sanitarium" and its agents, employees and servants as doing or failing to do certain things which are alleged to constitute actionable negligence. Plainly, this action was instituted under the provisions of Rule 17(b) of the Federal Rules of Civil Procedure and of Rule 2128(a) of the Pennsylvania Rules of Civil Procedure against the partnership as well as the named individual defendant partners.

Respondent was a citizen of Pennsylvania. The partnership (Sanitarium), since its only place of business was in Pennsylvania, under the jural entity concept, was a citizen of Pennsylvania. We submit, therefore, that this action should have been and should be dismissed for want of diversity of citizenship.

Respondent will not suffer any hardship if she cannot sustain her case in the federal courts, where she prefers to be because of the possible larger verdicts (Plaintiff's Answer to Defendants' Motion to Stay Proceedings, p. 4), because she entered a suit against petitioners and Dr. Kelly, the real tortfeasor, in the Court of Common Pleas of Mercer County, Pennsylvania, before she filed this action in the District Court (8a, 16a, 26b) and she would not be precluded by any dismissal of this action on jurisdictional grounds from proceeding in the State court action.

Conclusion

The Court of Appeals in the determination of whether the relationship between two parties was master and servant or employer and independent contractor, in a diversity case, failed to ascertain the applicable State law from all the available data and instead prescribed a different rule premised only the Court's opinion of what the State's highest court might decide on the precise facts of the case at bar, and therefore evinced a plain hostility to the Rules of Decision Act and the doctrine established by this Court in *Erie* and subsequent decisions. The Court of Appeals, in a diversity case, applied wrong State law to the facts before it and followed a procedure in conflict with the procedure

prescribed by decisions of this Court and Federal Courts of Appeals, because it did not compare the proofs or the words in the case at bar with those in the analogous cases which have been passed on in the highest court of the State and follow the State law in those decisions. The Court of Appeals also disregarded the provisions of Rule 51 and the general rule as to scope of review in Federal courts. The Court of Appeals also misused its judicial power of review and reached a decision in conflict with the decisions of other Federal Courts of Appeals, because it overruled a permissible conclusion of a District Court on a question of local law, not because it was clearly erroneous, but because on guessing, informed guessing if you will, the Court of Appeals guessed that the State's highest court might, on the same facts, decide in accordance with what the Court of Appeals thought was the more superior rule. Finally, viewing the case at bar by the actualities of the litigation, this is an action by a Pennsylvania plaintiff against a Pennsylvania defendant partnership and should, therefore, be dismissed.

This Court should exercise its supervisory power over the Federal courts to resolve the questions of far-reaching importance in the administration of the work of the Federal courts raised in the case at bar.

For all or any one or more of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MILTON W. LAMPROPLOS,
Attorney for Petitioners.

APPENDIX A

I.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

II.

Section 1 of the Pennsylvania Act of 1911, P. L. 639, as amended, 63 P. S. §401a.

Section 1. Practice of medicine or surgery without license prohibited; penalties

"It shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, or pretend to a knowledge of any branch or branches of medicine and surgery, or to hold himself or herself forth as a practitioner in medicine and surgery, or to assume the title of doctor of medicine and surgery or doctor of any specific disease, or to diagnose diseases, or to treat diseases by the use of medicines and surgery as defined in section 1 (c) of this act or by any other means, or to sign any death certificate, or to hold himself or herself forth as able to do so, excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the board, which license shall be properly recorded in the office

of the Superintendent of Public Instruction at Harrisburg.

"On first offense any person wilfully violating the provisions of this section of this act shall, upon conviction, be deemed guilty of a misdemeanor and shall be subject to a fine of not more than five hundred dollars or imprisonment for not more than six months in the county prison, or both or either, at the discretion of the court; on second offense shall be subject to a fine of not less than five hundred nor more than one thousand dollars and imprisonment of not less than six months nor more than one year, at the discretion of the court: Provided, That this section shall not apply to those persons who, under the laws of the Commonwealth, at the date of passage of this act have been accorded the right by a licensing certificate to diagnose and treat disease medically and surgically and to sign the form of death certificate required by the laws of this Commonwealth, or who are exempt therefrom by further provisions of this act. 1911, June 3, P. L. 639, § 2, as amended, 1941, Aug. 6, P. L. 903, §1."

III.

28 U.S.C.A., §1332. Diversity of citizenship.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States:

" * * * * * "

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,062

EMMA JEAN BROWN, Executrix of the Estate of GEORGE R. BROWN, Deceased,

Appellant,

v.

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN and ROBERT R. RICHARDSON

v.

WILLIAM R. INGRAHAM

On appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MCLAUGHLIN and HASTIE, Circuit Judges.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with the direction to reinstate the judgments in favor of the plaintiff.

Attest:

IDA O. CRESKOFF,

Clerk.

June 27, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

APPENDIX C TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Containing Opinion of Court of Appeals)

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,062

EMMA JEAN BROWN, EXECUTRIX OF THE ESTATE OF GEORGE R. BROWN, DECEASED,

Appellant,

v.

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN AND ROBERT R. RICHARDSON,

v.

WILLIAM R. INGRAHAM.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 22, 1957

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed June 27, 1957)

By BIGGS, *Chief Judge.*

Jurisdiction in this case is based on diversity of citizenship and jurisdictional amount. Suit was brought in the United States District Court for the Western District of Pennsylvania. The operative facts occurred in Pennsylvania. There is no doubt that the substantive law of Pennsylvania governs. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) and Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Our difficulty lies in trying to ascertain the law of Pennsylvania.

The plaintiff, the widow and executrix of George R. Brown (Brown), by her amended complaint, set up a cause of action arising under the Pennsylvania Wrongful Death Act, 12 P.S. Pa. §§ 1601, 1602, for the benefit of herself and her three minor children, and also a cause of action arising under the Pennsylvania Survival Act, 20 P.S. Pa. c. 3, Appendix, § 772. The defendants [1] are persons, who, with others, operated a private sanitarium for profit in Mercer, Pennsylvania under the style of "Mercer Sanitarium for the Treatment of Mental and Nervous Diseases" (Sanitarium) under the Pennsylvania Fictitious Names Act, 54 P.S. Pa. § 21. The Sanitarium is said to have been licensed to do business under Article II, Section 201(c) of Pennsylvania Public Law No. 414, Laws of Pennsylvania 1923, pp. 998, 1000.

The plaintiff contends that Brown's death, to employ the words of the amended complaint, resulted proximately from the "general, several and concurrent negligence" of the defendants acting "through their servants, agents and employees . . . within the scope of their agency and employment." In short, the plaintiff asserts that Brown was so negligently treated and with such a lack of professional skill by Dr. John L. Kelly, a neuro-psychiatrist, the "Medical Director" of the Sanitarium, and by its staff that his death resulted therefrom. The defendants assert that Dr. Kelly was "an independent contractor" and therefore the defendants themselves are not liable for any negligent or unskillful performance on his part. They also contend that they are relieved of all liability by reason of a release executed by the plaintiff and Brown and by an indemnification agreement executed by the plaintiff.

The case was tried to a jury which gave substantial damages to the plaintiff on both causes of action. The court below, however, granted motions made by the defend-

1 The third-party defendant, Ingraham, was brought upon the record by certain of the defendants named in the complaint as it was prior to the amendment.

ants for a directed verdict on the theory that Dr. Kelly was an independent contractor and that the defendants therefore could not be held liable for his negligence. See 143 F. Supp. 816 (1956). The court below directed in its final order that "judgment" be entered in favor of all the defendants including the third party defendant Ingraham. The appeal[2] followed.

The jury having found a verdict for the plaintiff all inconsistencies in the evidence must be resolved in her favor. So resolving them we state the following as the operative facts. Brown, a neurotic who believed that he was suffering from cancer, was sent to the Mercer Sanitarium for rest by his Pittsburgh neuro-psychiatrist, Dr. H. B. Finkelhor. While at the Sanitarium Brown was given at least two electro-shock treatments. The second treatment was administered apparently on the morning[3] of September 9, 1949. Following the treatment Brown was permitted to become ambulatory. He went to the second floor of the main building of the Sanitarium for massage and, having had it, fell down a flight of steps in the afternoon of the same day. There was evidence from which the jury could have found that Dr. Kelly, the neuro-psychiatrist and the individual "in charge" of the Sanitarium, failed to exercise reasonable care and professional skill in permitting Brown to descend the flight of steps unattended following the electro-shock treatment, and that Brown fell

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2 There were, as we have stated, two causes of action and the jury gave verdicts in favor of the plaintiff on both of them. Judgments were entered on these verdicts by the Clerk pursuant to Rule 58, Fed. R. Civ. Proc., 28 USC. The court, however, gave "judgment" in favor of the defendants, one judgment, not two. An "appeal" was taken; not two appeals. The failure of the court below to enter two judgments was an obvious clerical error which could have been corrected at any time prior to the filing of the notice of appeal. Rule 60(a) Fed. R. Civ. Proc., 28 USC. We conclude that we are justified in treating the plaintiff's appeal as going to both the judgments entered against her rather than vacate the judgments and remand to a presently very much overburdened United States District Court for technical correction.

3 The records of the Sanitarium were inadequately kept. Some of them seem to have been made after the happening of events complained of by the plaintiff.

down the steps because of this lack of care and of reasonable exercise of professional skill.

The noise of Brown's fall alarmed the Sanitarium staff who ran to help him. There was evidence from which the jury could have found that Dr. Kelly was not present at the time that Brown was picked up and carried to a bed in the adjoining treatment room. It is clear that Brown was carried to a bed by at least four persons who improperly held him by his extremities, with his head hanging down. Brown complained that he had broken his neck in the fall and that he had suffered partial paralysis. He was removed to his own bed in his own room and by this time his arms and legs were paralyzed. Dr. Kelly and another doctor who was later called in from the town of Mercer to assist Dr. Kelly concluded that Brown had suffered no real or substantial injury and that his condition resulted simply from hysteria. Brown never received proper, adequate or skillful medical treatment. In fact the treatment accorded Brown was such as probably to aggravate his condition. There was evidence from which the jury was entitled to find that Dr. Kelly was guilty of malpractice. That malpractice involved "medical" acts requiring professional skill as distinguished from "administrative" acts.[4] The jury was entitled to find, as it did,

4 Pennsylvania adheres to the difficult doctrine that there is a distinction between "medical" acts and "administrative" acts. Benedict v. Bondi, 384 Pa. 574, 580-81, 122 A. 2d 209, 212 (1956). This doctrine was carried into the law of most of the States which have followed the decision of the Court of Appeals of New York in Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914). But as was said by the Court of Appeals of New York in Bing v. St. John's Episcopal Hospital, N.Y. , N.E. 2d (1957), "a consistent and clearly defined distinction between the terms ["medical" acts and "administrative" acts] has proved to be highly illusive," citing numerous New York decisions. Perhaps the most interesting of these are Necolayff v. Genesee Hospital, 296 N.Y. 936, 73 N.E. 2d 117 (1947), holding that administering blood by means of a transfusion to the wrong patient is administrative, and Berg v. New York Soc. for Relief of Ruptured and Crippled, 1 N.Y. 2d 499, 136 N.E. 2d 523 (1956), holding that administering the wrong blood to the right patient is medical. In our opinion the furnishing of attendance following electro-shock therapy to a patient, as in the case at bar, is a medical act because the physician, the neuro-psychiatrist, who administered the shock must determine the extent and duration of the attendance required to safeguard the patient. It is unnecessary to treat with this subject further in this opinion for we are of

that Brown's death resulted from Dr. Kelly's improper and inadequate treatment.[5]

We point out that a person going to a doctor for treatment impliedly contracts with him for treatment and under the law of Pennsylvania if the doctor fails to afford proper treatment and care a malpractice suit sounding in tort can be maintained.[6] It is also the law of Pennsylvania that partners are liable for trespass by themselves or by their employees in the legitimate course of the partnership business. 59 P.S. Pa. § 35, and Baxter v. Wunder, 89 Pa. Super. 585 (1927).

We come now to the central issue in the case. Can the defendants, partners in the operation of the Sanitarium as the court below correctly concluded them to be, be liable for Dr. Kelly's malpractice?[7] There was evidence that the

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the view that insufficient evidence was presented to the jury to find on the present record that Brown died because of improper "administrative" acts, though there were several of them.

5 Dr. Kelly named originally as a defendant was removed from the record by the amendment to the complaint. The reason for the removal was apparently because Dr. Kelly had become a citizen of Pennsylvania. Therefore if he remained a defendant the diversity necessary to maintain jurisdiction would be lacking.

6 There is no question that under the law of Pennsylvania as under that of most of the States a failure to perform a duty imposed by contract or to fulfill a representation may constitute a tort. See Todd v. Figley, 7 Watts 542 (1838); M'Cahan v. Hirst, 7 Watts 175 (1838); Smith v. Seward, 3 Pa. 342 (1846); Reeside's Executor v. Reeside, 49 Pa. 322 (1865); Zell v. Dunkle, 156 Pa. 353, 27 Atl. 38 (1893); Eckert v. Penna. R.R. Co., 211 Pa. 267, 60 Atl. 781 (1905); Hirsch, etc. v. Iron City Sand & Gravel Co., 73 Pittsburgh Law Journal 205 (1924); Peters v. Webb, 9 Bucks Co. L. Rep. 253 (C.P. Bucks County 1950); Marcus v. N.J.R. & Plate Glass Ins. Co., 18 Luz. L.Reg. Rep. 221 (C.P. Luzerne Co. 1915). As to the law generally, see 1 C.J.S., Actions, § 49.

A person going to a doctor for treatment impliedly contracts with him for treatment and under the law of Pennsylvania if the doctor fails to afford reasonably proper treatment and care a malpractice suit sounding in tort can be maintained. See Powell v. Risser, 375 Pa. 60, 99 A. 2d 454 (1953), trespass; Scacchi v. Montgomery, 365 Pa. 377, 75 A. 2d 535 (1950), trespass for wrongful death; Schull v. Schwartz, 364 Pa. 554, 73 A. 2d 402 (1950), trespass for malpractice; McConnell v. Williams, 361 Pa. 355, 65 A. 2d 243 (1949), trespass for personal injuries; Bierstein v. Whitman, 360 Pa. 537, 62 A. 2d 843 (1949), trespass.

7 We observe that the plaintiff struggled valiantly against every effort made by the trial court to designate the defendants and those engaged with them in the ownership and management of the Sanitarium as "partners." The court in its charge called the defendants "partners," stating: "It is undisputed

defendants had no control of Dr. Kelly in the performance of his professional duties, albeit one of the defendants, William W. Richardson, Jr., was a doctor. It is the defendants' contention and one that finds support in the law of some of the States, 19 A. L. R. p. 1183, § 5, that a doctor who is employed in a hospital to perform professional duties and is not subject to the control of the hospital is an independent contractor, and that the hospital which makes the doctor available is not liable to a third person for

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that the defendants and the third-party defendant [Ingraham] are partners. . . ." If the defendants and those engaged with them in the operation of the Sanitarium were co-partners in the Sanitarium enterprise under the Pennsylvania Uniform Partnership Act, 59 P.S. Pa. §§ 1 *et seq.*, there can be no doubt that each partner would be jointly and severally liable for the tortious act of any other partner. There was evidence on the issue of whether or not Dr. Kelly could be deemed to be a member of the partnership. Note the offer of partnership contained in the letter of February 5, 1949, written by Ingraham, the General Manager of the Sanitarium, to Dr. Kelly and Ingraham's testimony at the trial. This evidence was susceptible to the inference that Kelly conducted the Sanitarium's medical treatments while Ingraham ran the business end of the venture, and that they worked co-jointly and to their mutual interest to maintain the Sanitarium unit. The fact that Dr. Kelly was engaged in professional work and Ingraham carried on administrative duties, he not being entitled, since he was not a doctor, to practice medicine, would not militate against the creation of a partnership. See Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 Atl. 178 (1938), but see the interrogatories and the answers thereto which indicate that Dr. Kelly received no share of the profits of the Sanitarium. In any event the court did not charge the jury on any possible issue of Dr. Kelly being a co-partner with the defendants in the Sanitarium enterprise and the plaintiff did not request such a charge or object to the lack of it. The issue is therefore unavailable to the plaintiff on the present record.

As to the supervision of Dr. Kelly by the partners, it should be noted that one of the defendants, William W. Richardson, Jr., was a doctor. The record is silent as to whether he was licensed to practice medicine in Pennsylvania. The evidence shows that at the time of the happening of the events complained of Dr. Richardson was in charge of a private sanitarium in the State of Washington. While such an absence would not necessarily have relieved him of the duty of supervision of Dr. Kelly, the plaintiff again raised no issue as to such supervision and it is therefore unavailable to her on the present record.

We also apprehend that the plaintiff misunderstood the nature of the law of Pennsylvania and was perhaps unaware that an action of tort could grow out of a breach of duty imposed by contract. If the suit was for breach of contract the liability of the partners might have been construed to be joint, not joint and several as would be their liability in tort. See The Pennsylvania Uniform Partnership Act, 59 P.S. Pa. §§ 35-37. All the partners would then have been indispensable parties. But if all the partners were brought upon the record, including those resident in Pennsylvania, as they had been by the complaint as it was prior to the amendment, diversity jurisdiction would have been lost.

the doctor's negligence so long as the doctor has been selected with reasonable care by the hospital. This doctrine came into the law of some of the States, perhaps of a majority, following the decision of the Court of Appeals of New York, written by Judge (later Mr. Justice) Cardozo, in Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914). The Schloendorff decision was overruled very recently by the Court of Appeals of New York in Bing v. St. John's Episcopal Hospital, — N.Y. —, — N.E.2d — (1957). New York had received the doctrine earlier from the Supreme Judicial Court of Massachusetts which had held in McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876), that a charity patient negligently operated on by a student doctor could not hold the hospital liable, the court stating in substance that the donations which supported the charitable institution constituted a trust fund which could not be diverted by a tort claim. As is pointed out by Judge Fuld in his brilliant opinion in the Bing case, *supra*, the Massachusetts court as its sole authority "relied on an English case (Holliday v. St. Leonard's, 11 C.B. (N.S.) 192, 142 Eng. Rep. 769), which in turn was based on a dictum in a case decided in 1839 (Duncan v. Findlater, 6 Cl. & Fin. 894, 7 Eng. Rep. 934), without apparently observing that the dictum in the earlier case had been overruled (see Mersey Docks v. Gibbs, L.R. 11 H.L. Cas. 686) and that the decision in the other had been reversed. (See Foreman v. Mayor of Canterbury, L.R. 6 Q.B. 214.)."

Judge Fuld in note 1, cited to the text of his opinion in the Bing case, cogently quoted in part from the decision of the Supreme Court of Washington in Pierce v. Yakima Valley Memorial Hospital Ass'n, 43 Wash. 2d 162, 167, 260 P. 2d 765, 768 (1953), as follows: "Ordinarily, when a court decides to modify or abandon a court-made rule of long standing, it starts out by saying that 'the reason for the rule no longer exists.' In this case, it is correct to say that the 'reason' originally given for the rule of immunity never did exist." We agree with the view that the reason orig-

inally given for the rule of immunity never did exist but it has stood for some eighty years in State courts.[8]

In Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910), the Supreme Court of Pennsylvania made it plain that a public charitable hospital was immune from liability arising from the torts of its servants on the theory that the charitable funds given for its maintenance would be destroyed if they could be reached by judgment. The principle of the Gable decision is, of course, not applicable here for the Mercer Sanitarium was conducted for profit. There is no decision of the Supreme Court of Pennsylvania nor of the Superior Court of Pennsylvania which deals with the liability of a private hospital or sanitarium run for profit.

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8 Judge Fuld stated: "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

"Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of *respondeat superior*. The test should be, for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment.

"The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. If instead adherence to the precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to adhere to it. On the contrary, as this court, speaking through Judge Desmond in *Woods* v. *Lancet* (303 N.Y. 349, 355) declared, we would be abdicating 'our own function, in a field positively non-statutory,' were we to insist on legislation and 'refuse to reconsider an old and unsatisfactory court-made rule.'

"In sum, then, the doctrine according the hospital an immunity for the negligence of its employees is such a rule, and we abandon it. The hospital's liability must be governed by the same rules of law as apply to all other employers."

It is possible of course in view of the Bing decision of the Court of Appeals of New York—a court whose decisions we believe to have great weight with the Supreme Court of Pennsylvania—that that Court might adopt the enlightened rule of the Bing case in respect to both public and private hospitals. Other strong courts have adopted a similar rule.[9] But it is not necessary to go so far. We are of the opinion that the Supreme Court of Pennsylvania would hold that a neuro-psychiatrist, such as Dr. Kelly, a "Medical Director" employed at a salary to run a sanitarium maintained for private profit, and to give treatments therein, is an agent or employee of those who own the sanitarium and that the application of the rule of *respondeat superior* applies. Conversely we do not see how a "Medical Director," engaged as under the circumstances at bar, can be an independent contractor [10] and the doctrine of the inde-

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9 See Wheat v. Idaho Falls Latter Day Saints Hospital, 297 P. 2d 1041 (Idaho 1956); Pierce v. Yakima Valley Memorial Hospital Ass'n., 43 Wash. 2d 162, 260 P. 2d 765 (1953); Waynick v. Reardon, 236 N.C. 116, 72 S.E. 2d 4 (1952); Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951); Durney v. St. Francis Hosp., 46 Del. 350, 83 A. 2d 753 (1951); Haynes v. Presbyterian Hospital Ass'n., 241 Iowa 1289, 45 N.W. 2d 151 (1950); Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W. 2d 247 (1946); Treptau v. Behrens Spa, Inc., 247 Wisc. 438, 20 N.W. 2d 108 (1945); Hanach v. Hackett, 190 Wash. 97, 66 P. 2d 1129 (1937); Jenkins v. General Hospital, 90 W. Va. 230, 110 S.E. 560 (1922); and O'Brien v. American Casualty Company, 58 Wash. 477, 109 Pac. 52 (1910).

10 It is the law of Pennsylvania that an individual employing an independent contractor is not liable for the latter's negligent acts if reasonable care has been exercised in the selection of the independent contractor. Here one of the partners was a doctor. See Note 7, *supra*. The Supreme Court of Pennsylvania, however, has gone further in the direction of protecting him who has engaged an independent contractor from liability for the contractor's negligence than most State courts for the Supreme Court of Pennsylvania has held that there is a presumption that the independent contractor has been selected with due care. Silvern v. Grossman, 307 Pa. 272, 161 Atl. 362 (1932); Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 185, 191 (1879). There is nothing in the record to show that Dr. Kelly was licensed to practice medicine in Pennsylvania as required by the law of that State. 63 P.S. Pa. §§ 401-415. Cf. the statement made by Dr. James B. Spradley, a witness for the plaintiff testifying on cross-examination that he assumed that Dr. Kelly was licensed to practice medicine in Pennsylvania. The record is silent as to the educational background of Dr. Kelly and the exact nature of his qualifications. In view of the presumption favored by the law of Pennsylvania that an independent contractor is presumed to have been selected with due care we find it unnecessary on the present record to discuss any issue relating to the qualifications or licensing of Dr. Kelly to practice medicine in Pennsylvania.

pendent contractor seems completely inapplicable under the facts of the case at bar.

We find some traces of Pennsylvania law presently in being and applicable to the case at bar in the dissenting opinion of Mr. Justice Allen M. Stearne, in which Mr. Justice Patterson joined, in McConnell v. Williams, 361 Pa. 355, 367-8, 65 A. 2d 243, 249 (1949). In this case a patient was suing a doctor, a surgeon, for the negligence of another doctor, an interne. Mr. Justice Stearne said that the hospital in which the surgeon had performed a Caesarian section with the interne assisting him was not organized for profit but was maintained and conducted by charitably minded citizens and that such an institution was insulated from liability arising because of the negligent acts of any of its servants and employees but he went on to say: "They [the majority] commence with a false premise, upon which they have erected an erroneous hypothesis. It is assumed that a charitable or public hospital has the same attributes that would exist if the surgeon conducted a private hospital, where the doctrine of respondeat superior would apply. *A private hospital, however, is operated for profit and consequently the owners are responsible for the negligence of of their servants and agents as they would be if engaged in any other business enterprise.*"[11] Cf. Restatement, Agency § 214, and Dickerson v. American Sugar Refining Co., 211 F. 2d 200, 203 (3 Cir. 1954).

This is a statement of the views of two former Justices of the Supreme Court of Pennsylvania to the effect that a private hospital operated for profit is responsible for the negligence of its servants and agents and that a doctor may be an employee of a hospital. It should be noted that in 1949 while Mr. Justice Stearne and Mr. Justice Patterson might not have approved the broad general principle enunciated in the Bing case, *supra*, nonetheless the two Justices were of the view that the Supreme Court of Penn-

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11 Emphasis added.

sylvania would have ruled that the owners or operators of a hospital maintained for profit would be held liable for the torts of their agents and servants.

But even if we assume—though we think that such an assumption would be erroneous—that the Supreme Court of Pennsylvania would rule that Dr. Kelly under the circumstances at bar was an independent contractor, there is another cogent factor which we think would compel the Courts of the Commonwealth of Pennsylvania to hold the defendants liable in the case at bar.

What is that factor? We are of the opinion that where there has been a *holding out*, a *representation* to a patient or to his family as members of the public, that medical treatment is to be administered in a private hospital or sanitarium by a doctor employed therein, the Courts of the Commonwealth of Pennsylvania would apply the doctrine of *respondeat superior* and hold the owners or operators of the sanitarium liable for the malpractice of the doctor. In other words Doctor Kelly could be regarded as having the status of an independent contractor in his relation to the partners in the Sanitarium but in his relation to Brown would be deemed to be an employee of the Sanitarium.

Does the evidence show that there was such a holding out? There was the evidence of William T. Brown, Brown's brother who took him to the Sanitarium, that he did not know who the Sanitarium doctor was. Dr. Finkelhor, Brown's Pittsburgh neuro-psychiatrist, testified that he sent Brown to the Sanitarium because he knew Dr. McKay who had been in charge of the Sanitarium, but Dr. McKay had died months prior to September 5, 1949 when Brown was taken to the Sanitarium. The plaintiff's testimony was to the effect she too had believed Dr. McKay to be in charge. The release executed by the plaintiff and by Brown to the Sanitarium is particularly significant. It stated that the undersigned, the plaintiff and Brown, "*does* [sic] *hereby give* The Mercer Sanitarium *permission to administer any form of recognized medical treatment*, in-

cluding Electro-Shock Therapy, to George R. Brown which is deemed advisable by the Medical Staff of said Sanitarium and does hereby release THE MERCER SANITARIUM and its employees from any damage on this account." It would have to be conceded, we believe, that the Sanitarium doctor was the only person who administered electro-shock therapy to Brown or to any other patient. The language of the release is therefore capable of the inference that the Sanitarium held itself out as administering treatments and that "its employees" administered or were to administer the treatments. Since the doctor invariably acted to give the electro-shock treatments the statements of the release are susceptible to the interpretation that Dr. Kelly was one of "the employees" of the Sanitarium. True, the release states that such medical treatment was to be given as the "Medical Staff" "deemed advisable" but the first line of the release italicized above states that the permission was given to the Sanitarium to administer treatments.

The contract of indemnification, executed by the plaintiff alone, provides in pertinent part that the plaintiff will "indemnify THE MERCER SANITARIUM from any loss resulting from injury to or injury or damage caused by George R. Brown while a patient of Dr. J. L. Kelly *and the said Sanitarium*. . . ."[12] If Dr. Kelly had the status of an independent contractor in his relation to Brown and was not held out to the plaintiff and to Brown as one of the Sanitarium employees, why should such language have been employed? Moreover, if it was not held out or represented to Brown that he was a patient[13] of the Sanitarium why should he have been described literally as a "patient" of the Sanitarium?

There are other items of evidence, several of them also documentary, which are pertinent to the inquiry as to

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12 Emphasis added to the quotations from the release and the indemnification agreement.

13 Webster's New International Dictionary, 2d edition, defines a patient as: "sick person, now commonly, one under treatment or care, as by a physician or surgeon, or in a hospital; hence, a client of a physician, hospital, or the like."

whether the Sanitarium held itself out to the plaintiff and Brown as offering reasonable medical care and attendance to Brown. We shall deal with only three more such items here. Brown's "Office Record" is headed "The Mercer Sanitarium." A bill was submitted on September 6, 1949 by "The Mercer Sanitarium" "For Services Rendered Mr. George R. Brown from September 5, 1949, to September 19, 1949." This bill is itemized for "Care and Treatment" $130. and for either "Shock Treatments" or a "Professional Fee," $10.00. Whether the charge was for "Shock Treatments" or was a "Professional Fee," the language used would sustain the inference that the Sanitarium was giving shock or other treatments for a fee.[14] According to the bill all bills were payable two weeks in advance and this bill was rendered to Brown on the day after he arrived at the Sanitarium. It was paid by Brown by his own check, drawn to the order of the Sanitarium. It is peculiarly pertinent that the record shows that the Sanitarium collected the fees and that Dr. Kelly was paid a salary. There was not the "immediate and unbroken relationship between a professional man and those who engage his services" pointed out as essential in order to maintain the doctor-patient relationship by the Supreme Court of Pennsylvania in Neill v. Gimbel Brothers, Inc., 330 Pa. 213, 219, 199 Atl. 178, 181 (1938). Note also that Business Manager Ingraham testified that Dr. Kelly was "in charge" of the Sanitarium.

We are of the opinion that the evidence presented was sufficient to entitle the jury to find that the defendants held out to the plaintiff and to Brown that the Sanitarium through Dr. Kelly and the staff would furnish Brown reasonably skillful medical care and attendance.

There is a single Pennsylvania decision which is close to being in point to the case at bar on the issue of a holding-out or representation. It is Ulbrich v. Boone

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14 It is impossible to say from the exhibit whether the $10.00 fee was under the heading "Shock Treatments" or under the heading "Professional Fee" for the item $10.00 appears about equally between the two designations.

County Coal Corporation, 16 D.&C. 315-316 (1931), a decision of the Court of Common Pleas of Philadelphia County. In the Ulbrich case it appeared that the Coal Company collected sums of money from its employees and contracted to give them the services of a doctor in return for their contributions. The physician employed by the Coal Company negligently treated an employee's injured hand. It appeared from the statement of claim that the sums received by the Coal Company from its employees under the contribution system were more than it required to pay the expenses of maintaining the service and that there was a large profit which the Coal Company appropriated to its own use. The court stated:

"[T]he defendant has stated the general principle that the doctrine of *respondeat superior* does not apply in the case of injury done to an employee by the unskillful or careless treatment of a physician employed to treat the employees of a company; that one who employs a physician to administer to others without profit to himself is liable only for the failure to exercise due care in the selection and choice of a competent and skillful physician.

"While these principles are sound and recognized generally, they have no application to this case because of the averment in the statement [of claim] that the defendant furnished these services to its employees for profit. *Such being the case, the defendant is in no better position than one who holds himself out to offer medical treatment for gain, who is, under such circumstances, brought within the rule of master and servant and, therefore, liable for the carelessness or negligence of its employees. . . .*"[15]

While a ruling of a Court of Common Pleas of Pennsylvania is not binding on us or on the court below, Eckman v. Baker, 224 F.2d 964, 966 (3 Cir. 1955), nonetheless statements in an opinion of such a Court are indicative of what

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15 Emphasis supplied.

the law of Pennsylvania may be. It is the duty of the federal courts where, as here, the State law supplies a rule of decision to ascertain and apply that law "even though it has not been expounded by the highest court of the State," Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-178 (1940).

The Ulbrich decision is a well reasoned one and it must be borne in mind that the Supreme Court of Pennsylvania has never ruled on the question of the liability of the operators of a private hospital for the malpractice of a physician held out as being employed therein. We conclude that the Supreme Court of Pennsylvania would rule that it was a question for the jury under proper instructions from the trial court as to whether or not the defendants had held out or represented Dr. Kelly to be their employee to administer treatment to Brown. See the leading case of Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597 (1901), and the Ulbrich decision, *supra*. We are of the opinion that the law of Pennsylvania is in accord with this decision. If the answer to that question of fact was in the affirmative, and it must be presumed that the jury in the instant case so answered it, the Supreme Court of Pennsylvania would deem the doctrine of *respondeat superior* properly applicable to render the defendants herein liable on the doctrine of holding out or representation.

We are of the opinion that the charge was adequate to impose liability on the defendants on either of the two aspects of the case relating to the application of the principle of *respondeat superior*, which we have elucidated. We perceive no error in the charge which would require setting aside the verdicts of the jury and the judgments in favor of the plaintiff entered thereon.

This brings us to the issue of the release. The release consists of two parts which we have quoted at an earlier point in this opinion. The first part gave the Sanitarium permission to administer any form of recognized medical

treatment, including electro-shock therapy, to Brown which was deemed advisable by the medical staff of the Sanitarium. The second part of the document, which may properly be described as the releasing part, releases the Sanitarium and its employees "from any damages on this account." The plain intent of the release was to relieve the Sanitarium of liability for any injury resulting to Brown from his treatment as a neurotic at the Sanitarium, from electro-shock therapy or treatment of a similar nature. By its terms it obviously was not intended to release the Sanitarium from liability for injury to Brown caused by treatment of any other kind than that given to him as a neurotic. The medical treatment if, it can be called such, which Brown received following his fall down the flight of stairs had no legal causal connection with his treatment as a neurotic by electro shock-therapy or by any other similar therapeutic means. We hold therefore that the release is insufficient to relieve the defendants of liability for the negligent medical treatment of Brown, as both the jury and the court below found it to be, following his fall down the stairs. The effect of the release was purely a question of law for, as stated by the court below, no issue of fact was presented. Since the release by its terms could not have relieved the partners from the negligent acts of Dr. Kelly, the court below committed no error in failing to charge as to the effect of the release.

We regard the foregoing as dispositive of the issue presented by the release but since this case may well come before the reviewing Court we point out that even if the release were deemed sufficient to relieve the defendants of liability under the Pennsylvania Survival Act it could scarcely relieve them of liability under the Pennsylvania Wrongful Death Act for that Act provides benefits not only for the widow of a deceased person but also for his children. Even assuming that the release was effective as to the plaintiff, who executed it as did Brown, nonetheless Brown's children would be entitled to a recovery. If the release

were deemed to be sufficient it would bar recovery by the plaintiff in her suit based on the Pennsylvania Survival Act since the right given thereby arises under a Lord Campbell's Act type statute and Brown himself would be barred.

As to the indemnification agreement, it is the law of Pennsylvania that indemnification agreements are to be construed strictly "with every intendment against the party seeking its protection." Crew v. The Bradstreet Co., 134 Pa. 161, 19 Atl. 500 (1890). In Camden Safe Deposit & Trust Co. v. Eavenson, 295 Pa. 357, 364, 145 Atl. 434, 436 (1927), the Supreme Court of Pennsylvania said: "A party may contract for indemnity against the results flowing from his own acts; but 'no inference from words of general import can establish it'; on the contrary, 'the intent of both parties to that effect [must] be made apparent by clear, precise and unequivocal language.'"

In Perry v. Payne, 217 Pa. 252, 262, 66 Atl. 553, 557 (1907), the Court said: "We think it clear, on reason and authority, that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it. The manifest purpose, in such cases, to indemnify against the injury which, under the circumstances, could reasonably be apprehended only from the action of the indemnitor or his servant, is a weighty consideration in construing indemnity contracts."

It appears therefore under the law of Pennsylvania that if an indemnitee is to procure protection from loss resulting from his own negligence or from that of his employees or servants, the purpose or intent to effect such indemnification must be expressed in unequivocal terms

in the instrument itself. The indemnification agreement in the case at bar in no wise expresses in unequivocal terms an intent or purpose on the part of the plaintiff to indemnify the defendants for loss resulting from the negligence or malpractice of Dr. Kelly or the Sanitarium staff.

We so construe the indemnification agreement and we think that it is clearly apparent that no question as to its effect was presented for determination by the jury, but assuming *arguendo* that it was a jury question, the defendants requested no charge as to the agreement and the court did not charge in respect to it. There was no objection by the defendants to the failure of the court to charge in respect to the agreement as required by Rule 51, Fed. R. Civ. Proc., 28 USC. If there was a question for the jury the defendants have lost the opportunity to avail themselves of it.

The judgment of the court below will be reversed and the cause remanded with the direction to reinstate the judgments in favor of the plaintiff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 480

MARTHA R. MOORE, WILLIAM W. RICHARDSON, JR., JULIA R. CORBIN, ROBERT R. RICHARDSON and WILLIAM R. INGRAHAM, Petitioners

v.

EMMA JEAN BROWN, Executrix of the Estate of George R. Brown, Deceased, Respondent

BRIEF FOR RESPONDENT

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported at 143 F. Supp. 816. The opinion of the Court of Appeals is as yet unreported. It is stated at page two of petitioners' Brief that sufficient copies of the said opinion of the Court of Appeals have been filed with the Clerk of this Court, and that nine copies of the appendices filed by the parties with the Court of Appeals have been filed with the Clerk of this Court.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1). The questions presented by the petition for Writ of Certiorari, even as drawn by the petitioner in an attempt to invoke this Court's jurisdiction, do not constitute such matters of

importance, general interest or procedure, as to warrant the granting of the Writ requested.

As will be demonstrated in Respondent's argument, infra, those issues attempted to be raised by the petition are not supported by the record, and when the petition is examined in the light of the record, it is patently devoid of merit.

QUESTIONS PRESENTED

1. Where the principles enunciated in a logical and well reasoned local lower court opinion, precisely in point, have never been disapproved or discredited by the higher state courts and are instead consonant with the general law of the state in the applicable appellate decisions, is it not proper for the Court of Appeals in a diversity case to reverse the District Court's judgment based on an erroneous conception of the local law contrary to those decisions?

In other words, where a private hospital undertakes for profit to render care and treatment, and its employee in the performance of such contractual undertaking negligently injures the patient, is not the liability of the hospital owners to be determined in accordance with state law pertaining to the precise facts rather than mere statements in cases involving entirely unrelated factual situations?

2. Where a release or indemnity agreement is confined by its own terms to "any damages on this account" and those words refer directly to the administration "of recognized medical treatment" and the damage allegedly released was caused by administration of *un*recognized

medical treatment, were not the courts required to hold such language inapplicable, particularly where local law compelled a strict construction against the applicability of such agreements?

3. Where, under a proper instruction the jury found petitioners liable to respondent on the basis of the contractual undertaking, but the trial court thereafter on petitioners' motion set aside the judgments entered on the verdicts, was not the court's error in so ruling a proper subject of appeal by respondent?

Where, on such an appeal, the Court of Appeals reversed the District Court's said ruling, is the validity of that reversal subject to challenge merely because the Court of Appeals expressed the additional view that the District Court had also been wrong in ruling on the motion for directed verdict during the trial, that an alternate theory of liability suggested by respondent was inapplicable, particularly where the court had made its definite ruling on the record against the alternate theory of liability and in opposition to vigorous argument by respondent's counsel?

4. Where a Court of Appeals, reviewing a district judge's conception of local law is convinced that the judge has not given proper consideration to the applicable decisions within the state but has instead adopted his personal impression of the law by consideratioin of inapplicable decisions, is it not proper for the Court of Appeals to decide the case in accordance with the applicable local law and reverse the judgment of the District Court?

5. Where diversity exists as to all parties to an action and there are no other persons or entities who

are necessary or essential and there is not and cannot be a judgment against anyone other than the parties so named, does not jurisdiction exist in the federal court?

COUNTER-STATEMENT

Respondent is Executrix of the Estate of George R. Brown, her late husband, who died from negligently treated injuries received in a negligently induced fall, while he was a paying patient in a private sanitarium, owned and operated solely for profit by certain individuals, including the petitioners herein (T. 350). Respondent is and always has been a citizen of Pennsylvania. Those petitioners, who were sued by the respondent, all live in states other than Pennsylvania (T. 7).[1]

Brown, a thirty-two year old metallurgist, had developed an anxiety neurosis during the summer of 1949. He was the father of three small sons. The older two were aged six and four and the youngest was born five weeks before Brown died. Mr. Brown went to petitioners' sanitarium, seventy miles north of his home in Pitts-

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1. The first four petitioners named in the caption (Martha R. Moore, William W. Richardson, Jr., Julia R. Corbin and Robert R. Richardson) were sued by respondent. Throughout the seven years this case has been in litigation the first four petitioners were represented by Harold E. McCamey, Esquire, and the law firm of Dickie, McCamey, Chilcote, Reif & Robinson. They caused the fifth petitioner, William R. Ingraham, to be joined as a Third Party Defendant. The said Third Party Defendant has throughout the litigation been represented by Milton W. Lamproplos, Esquire of the law firm of Smith, Buchanan, Ingersoll, Rodewald & Eckert. It is significant to note that all five petitioners are now represented solely by Milton W. Lamproplos.

burgh, at the suggestion of the specialist, who had been treating him in Pittsburgh.

The medical facilities of petitioners' sanitarium were in charge of a Dr. John L. Kelly, whom the owners had designated as the Medical Director (T. 28). Prior to Mr. Brown's admission, neither he, his family nor his personal physician had ever heard of Dr. Kelly (T. 300). There was no evidence in the lengthy record that Brown employed or paid or agreed to employ or pay Dr. Kelly for his services. However, Brown did agree to pay and did pay the petitioners' sanitarium for that care and treatment (Exhibit A).

The care and treatment rendered Mr. Brown was afforded by registered and practical nurses, nurses aides and by Dr. Kelly, all of whom were employed and paid salaries by the petitioners (T. 349-355). Dr. Kelly's salary did not depend on the number of patients treated nor the type of treatment which he afforded (T. 340). The usual deductions such as social security, etc., were made by petitioners from Dr. Kelly's and the other employees' salaries (T. 346). In addition to paying his salary, petitioners gave Dr. Kelly a residence on the sanitarium's grounds and some of his maintenance. He was on call twenty-four hours a day (T. 344). Petitioners permitted Dr. Kelly broad managerial powers with regard to the medical facilities and personnel, and he was granted the right to "diagnose and such" (T. 26-46). Dr. Kelly was also advised by petitioners' representative that he would have a very broad authority and would in fact act more or less as a partner of "The sanitarium owners" (T. 46). The owners also retained the right to discharge Dr. Kelly at any time (T. 348-354). In their original pleadings, the petitioners failed to deny the alle-

gations in the Complaint regarding the fact of Dr. Kelly's agency. Only by an amended Answer filed approximately two and one-half years later did they make such a denial.

Petitioners' own record showed that there was a definite contractual relationship between the petitioners and Brown regarding medical care and treatment (Exhibit A-27b). By the same token, there were no obligations or duties assumed by or between Dr. Kelly and Brown (See the entire record). On Brown's admission, he and his wife signed the petitioners' printed admission card, giving "THE MERCER SANITARIUM permission to administer any form of *recognized* medical treatment, including Electro-Shock Therapy to George R. Brown, deemed advisable by the Medical Staff of said Sanitarium, and does hereby release THE MERCER SANITARIUM and its employees from any damages on *this* account."[2] In authorizing the expenses to be charged to her and agreeing to pay the bills, Mr. Brown's wife alone signed another printed paragraph on the same admission card, agreeing to indemnify The Mercer Sanitarium from any loss resulting from injury to or injury or damage caused by George R. Brown (Exhibit A-27b).

During his third day, Mr. Brown was given a shock treatment and later fell down the steps, which he was permitted to descend unattended (T. 8-64-172-180). The cause of the fall was shown to be due to hysteria (Exhibits 5-6-7). As a result of the fall, he sustained a fracture-dislocation of the neck (Exhibit 2). All the treatment afforded thereafter by petitioners' staff was shown to be directly contrary to that indicated by the very obvious symptoms of the true pathology. This

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2. Emphasis supplied.

treatment and lack of treatment was of such magnitude that one of petitioners' own expert witnesses was forced to admit under cross-examination that it "was too bad" Brown had not been attended by Boy Scouts rather than by the petitioners' staff (T. 504).

After four days of such treatment, Brown died. Respondent first instituted a suit against petitioners in the United States District Court for the Western District of Pennsylvania (Civil Action No. 9071). On the next day, a cautionary suit was also filed in the local state court. Because of a technical error in the suit first filed in the United States Court, respondent 2 days later filed this action in the same United States District Court to take the place of the action first filed. Subsequently, the first action was dismissed on stipulation without prejudice and respondent, pursuant to the applicable rules, instructed the state court to enter a voluntary nonsuit in that action which the state court refused to enter.

At the trial, respondent submitted in evidence such records and testimony as were available, demonstrating the relationship existing between petitioners and Dr. Kelly as hereinabove set forth. Much of that evidence was adduced through a witness who is one of the petitioners herein.[3] At the close of respondent's case, the trial court, over respondent's strenuous objection, entered a ruling that the negligent employees were independent contractors (T. 435). The Court then submitted the case to the jury on the alternate theory of liability, based on the alleged tortious breach of petitioners' contractual obligation to afford Brown such reasonable care and skill as his condition indicated and re-

3. William R. Ingraham.

quired (T. 436-704-705-706). The jury found that the petitioners had negligently performed those duties and returned verdicts in favor of respondent totalling $60,000.00.

Petitioners filed motions to enter judgment in accordance with their motions for directed verdicts, or in the alternative to grant a new trial or to dismiss the action on jurisdictional grounds. The District Court ruled that there was ample evidence to support the verdicts as to negligence and damages and that the verdicts were not against the weight of the evidence (29a 30a). The District Court also held that jurisdiction was properly laid in the Federal Court and refused to dismiss the case on jurisdictional grounds (26a).

However, the District Court, on the basis of dicta in certain unrelated cases, conceived the law of Pennsylvania to indicate a reluctance to extend liability for negligence to an employer whom the Court deemed not to be in personal control of the negligent employee.

From the judgment entered by the District Court, setting aside the verdicts rendered by the jury in her behalf, respondent appealed to the Circuit Court of Appeals for the Third Circuit, contending that in ruling as it did, the District Court had failed to apply the doctrine established by the decision of the United States Supreme Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, by refusing to follow local lower court authority directly in point, which was strongly supported by those Pennsylvania appellate decisions most closely in point, The Restatement of the Law and by the tremendous weight of respected foreign authority.

The Court of Appeals for the Third Circuit held the Pennsylvania lower court decision to be directly in point, that it was a well reasoned opinion, was not at odds with any appellate pronouncement within the state and was in fact supported by dicta in those cases most closely in point decided by the state's highest appellate court. The Court of Appeals then reversed the judgment of the District Court and ordered the respondent's verdicts reinstated. In so holding, the Court of Appeals ruled that the District Court had properly submitted the case to the jury on the theory that by contracting with Brown for medical services, the petitioners had undertaken a non-delegable duty to perform such services in a proper and reasonable manner (Page 11).

No appeal was taken by the petitioners from the refusal of the District Court to dismiss the actions on jurisdictional grounds. The Court of Appeals by its opinion also held that the clause on the admission card, proporting to be a release, did not constitute a release of the claim on which the action was founded. The Court of Appeals further held that the clause on the admission card concerning indemnity was too vague to be given effect as such since the law of Pennsylvania requires such agreements "to be construed strictly 'with every intendment against the party seeking its protection.'"

Petitioners requested a re-argument before the Court of Appeals which was denied.

REASONS FOR REFUSING THE WRIT

1. The decision, and the entire basis for the decision, of the Court of Appeals in this case is in complete accord with the principles enunciated and established by Erie R. Co. v. Thompkins, 304 U.S. 64, and all the related cases and statutes cited in petitioners' brief. It was because of the District Court's failure to comprehend its duty and apply those principles that an appeal was necessary and a reversal was mandatory in this case.

It is impossible to be so charitable with the petitioners. They have not merely failed to comprehend the duties imposed by *Erie R. Co. v. Thompkins*, and those later cases following, extending and applying its doctrine. The brief submitted in support of the petition is a compound mis-statement of the facts and law involved in this litigation.*

*A shocking illustration of such tactics appears at page 26 of the petition. It is there stated that the Court of Appeals admitted that the determination of the District Court as to Dr. Kelly's status as an independent contractor and that petitioners were not liable for malpractice has support "in the law of some States, perhaps of a majority . . ." Careful examination of the opinion shows that no such admission was made and that the alleged quotation does not appear in the opinion but is concocted by petitioners out of independent and separate statements at pages 6 and 7 of the opinion. It is to be noted also that even had the alleged quotation been accurate it would still be out of context, as it appears in the petition, concerning anything which the court did actually say. If the quotation were accurate it would still ignore the further statement by the Court of Appeals (page 7) that the validity of any such rule had been absolutely swept away by the opinion of the New York Court of Appeals in the very recent case of Bing v. St. John's Episcopal Hospital, ...N.Y. ....., ... N.E. 2d .... (1957). Other instances of similar tactics by petitioners are noted, infra.

It is perhaps immaterial to call attention to the fallacy of the petitioners' averments that the evidence rebutted the fact of a master-servant relationship existing between the petitioners and their employed doctor. It is immaterial because the decision from which this petition is taken is based not on the legal effect of the relationship between the petitioners and their employee, but on the legal relationship existing between petitioners and the respondent's deceased husband. That this is so is clearly declared in the opinion of the Court of Appeals as follows (page 11):

> "But even if we assume—though we think that such an assumption would be erroneous—that the Supreme Court of Pennsylvania would rule that Dr. Kelly under the circumstances at bar was an independent contractor, there is another cogent factor which we think would compel the Courts of the Commonwealth of Pennsylvania to hold the defendants liable in the case at bar.
>
> "What is that factor? We are of the opinion that where there has been a *holding out, a representation* to a patient or to his family as members of the public, that medical treatment is to be administered in a private hospital or sanitarium by a doctor employed therein, the Courts of the Commonwealth of Pennsylvania would apply the doctrine of *respondeat superior* and hold the owners or operators of the sanitarium liable for the mal-practice of the doctor. In other words, Doctor Kelly could be regarded as having the status of an independent contractor in his relation to the partners in the sani-

tarium but in his relation to Brown would be deemed an employee of the Sanitarium." (Emphasis added)

It was on this basis—that is the relationship between the petitioners' Sanitarium and the decedent—that the verdicts were rendered (T. 704-705). The District Court refused to submit the case to the jury on the alternate theory of an actual master-servant relationship (T. 435). Though, as we have already pointed out, the validity of the judgment was in no way dependent on the actual existence of control over the doctor, since it has been erroneously stated that the evidence conclusively established the lack of control, we feel constrained to point out that all the factual evidence of the relationship, demonstrated that Dr. Kelly was strictly an employee and as such subject to very real control. The only evidence to the contrary was the statement of the witnesses' *conclusion* that Dr. Kelly was not subject to control and was an independent contractor. Respondent was not necessarily bound by these conclusions since the witness who stated them was one of the petitioners and antagonistic to respondent. The law concerning the inconclusiveness of such statements is to be found in *Signa Johnston, Admrx. v. B. & O. R. R. Co.*, 208 F. 2d 633 (3 Cir. 1953).[4]

Returning to the material issues, we note with amazement the declaration that the case was not tried on the basis of the relationship existing between decedent and petitioners' Sanitarium. Every bit of evidence

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4. It was there stated, at page 635, that such testimony is not necessarily binding or conclusive upon the party calling the witnesses. The case reviewed a decision based on Pennsylvania law.

available was submitted on that very point. The reasons and circumstances of Brown's trip to the Sanitarium were developed at length (T. 8, 193, 362, 364). The circumstances and, so far as permitted, the conversations surrounding his admission and treatment, were put in evidence (366-373). The representations in the written parts of the contract between the parties were admitted as exhibits (Exhibit A, T. 51, 370-372). During the trial it was clearly stated that the case would be submitted to the jury on that theory (T. 436) and the case was submitted to the jury on that theory (T. 706). There absolutely was no rebuttal of the existence of the representation or of the relationship between the parties. (See the entire record). There is not a single authority in Pennsylvania legislative or judicial—express or implied—which prohibits the application of such a theory. The cases cited by petitioners' (footnotes 3, 5, 7 and 8) are in no way in point with respect to that theory. They deal solely with classic master-servant situations and do not bear in any way on the theory of liability through contractual representation on which the case was tried, submitted to the jury and on which the decision of the Court of Appeals reversed the District Court.

There is absolutely no merit in the assertion that because the practice of medicine by unlicensed persons is prohibited by statute, respondent and her husband could not have understood that Dr. Kelly was acting as the petitioners' employee. Even if they were presumed to know the law, the actions, circumstances and writings created by the petitioners could not but lead persons dealing with them to assume that petitioners were quali-

fied to render the services contracted for and for which the patients agreed to pay petitioners. They were in no way put on notice to examine the qualifications of the petitioners to see whether the appearances created were true or false.

The case of *Durkin v. Kingstone Coal Co.*, 171 Pa. 193, 199, 201, 203, 33 A. 239, cited by defendant is readily distinguishable. In that case a Pennsylvania statute was held unconstitutional because it imposed liability on certain companies for the negligence of a foreman who had to be selected from a group of persons specially licensed by the state. Liability in the instant case is not imposed by statute and the petitioners were at all times at perfect liberty to escape liability simply by foregoing the profits of medical practice and/or by avoiding appearances to prospective patients that they were dispensing medical services.

The most amazing assertion in the petition is that there is no Pennsylvania authority to support the legal proposition upon which the verdicts were based and the Court of Appeals' decision was founded. Time and time again, throughout this lengthy litigation, the case of *Ulbrich v. Boone County Coal Corporation,* 160 D. & C. 315-316 has been cited. That case was reported in 1931 by the Court of Common Pleas of Philadelphia County, Pennsylvania. It has never been overruled or disapproved in any particular. There is no appellate court case which by dictum or otherwise detracts from its validity. It was quoted at length by the Court of Appeals which recognized that because it was not an appellate decision, it was not binding (citing Eckman v. Baker, 224 F. 2d 954 (3 Cir. 1955)). This case involved

a company which employed a physician to treat its employees. The company collected sums from the employees to pay for this service. It appeared that the sums collected exceeded the cost of the service and the company thus made a profit. An employee negligently treated by the doctor sued the company which interposed the defenses presently advanced by petitioners. The Court stated:

> "[T]he defendant has stated the general principles that the doctrine of respondeat superior does not apply in the case of injury done to an employee by the unskillful or careless treatment of a physician employed to treat the employees of a company; that one who employs a physician to administer to others without profit to himself is liable only for the failure to exercise due care in the selection and choice of a competent and skillful physician.
>
> "While these principles are sound and recognized generally, they have no application to this case because of the averment in the statement [of claim] that the *defendant furnished these services to its employees for profit. Such being the case, the defendant is in no better position than one who holds himself out to offer medical treatment for gain, who is, under such circumstances, brought within the rule of master and servant and, therefore, liable for the carelessness or negligence of its employees . . .*"[5]

The operative facts in both the Brown and Ulbrich cases were identical with the exception that Brown

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5. Emphasis supplied.

might much more rationally presume that sanitarium owners were qualified to tender the proffered medical services. In both cases the defendants sought to profit from the practice of medicine by an employee and then when things went wrong to deny liability on the basis of their lack of qualifications to personally perform such services. We submit that the Court of Appeals was more than justified in accepting the logic and justice of such a decision. It was also supported by the authority of this Court in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-178 (1940).

The petitioners have entirely ignored, and in fact denied the existence of, the Ulbrich decision and thereby have clearly revealed the invalidity of all their other arguments. The District Court in setting aside the verdicts for respondent dealt almost as inadequately with the Ulbrich decision (25a). It simply stated, without citing any authority, that it conceived the law of Pennsylvania to be otherwise and without any justification, that the Ulbrich case was dependent on reasons of public policy stemming from the facts there involved. These conclusions of the District Court were completely at odds with each other. No attempt was made to explain what considerations of public policy applied in the Ulbrich case which were not at least as applicable to a patient submitting himself for treatment to a privately owned sanitarium operated for profit.

In accepting the validity of the Ulbrich decision, the Court of Appeals was justified by these additional factors. First, there was nothing in the appellate decisions of Pennsylvania detracting therefrom. Second, dictum

in a recent Penna. Supreme Court case[6] indicated that a doctor or other professional employee might be regarded as the servant of a hospital. Third, the only reason ever advanced by the Supreme Court of Pennsylvania for denying liability in the case of *public charitable* hospitals was that their funds constituted a public trust.[7] Fourth, Pennsylvania admittedly follows the Restatement of the Law where it has not been expressly rejected and the Restatements support the conclusions reached at the trial of the Brown case and in the Ulbrich decision.[8] Fifth, there are Supreme Court decisions in Pennsylvania applying the same principles in non-medical cases.[9]

6. McConnell v. Williams, 361 Pa. 355, 367-8, 65 A.2d 243, 249 (1949), cited at page 10 of the opinion by the Court of Appeals.

7. See for example Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910), cited at page 8 of the opinion by the Court of Appeals.

8. Restatement of Torts Section 429 states: "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for bodily harm caused by the negligence of the contractor in supplying such services to the same extent as though the employer were supplying them himself or by his servants."

See also Restatement of Agency Section 214, comment (a); Restatement of Agency Section 220, comment on subsection (1); and Restatement of Agency Section 223.

9. Simpson et ux., v. Southern Pennsylvania Traction Co., 260 Pa. 526, 529-30, 103 Atl. 884 (1918). See also Prethrow v. West Jersey & Seashore Railroad Company, 214 Pa. 112, 114, 63 Atl. 415 (1906). There are other similar citations to be found in the cases herein noted. At page 5 (footnote 6) of the opinion of the Court of Appeals, there is an additional list of other Pennsylvania cases so holding.

Sixth, this theory of liability has been accepted in private hospital cases by the tremendous weight of foreign authority.[10]

Under these facts and this law, it was hardly appropriate to characterize the carefully considered opinion of the Court of Appeals as a "guess". It goes without saying that had its opinion been otherwise, there would have been ample cause for the respondent to petition this Court invoking the doctrine of *Erie R.*

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10. 26 American Jurisprudence 598; Hedlund v. Sutter Medical Service Co., et al., 51 Cal. App. 327, 124 P. 2d 878, 881 (1942); Hawthorne v. Blythewood, (Connecticut) 174 Atl. 81, 84; Durney v. St. Francis Hospital, (Del. 1947) 83 A. 2d 753, 758; Garfield Memorial Hospital v. Marshall, 204 F. 2d 721 (C.A.D.C. 1953); Parrish v. Clark, 145 So. 848, 850 (Fla. 1933); Piedmont Hospital v. Anderson, 16 S. E. 2d 90, 98 (Ga. 1941); Corey v. Beck, 72 P. 2d 856 (Ida. 1937); Crump v. Garfield Park Sanitarium, 147 Ill. App. 7, 16 (1909); Grigalauskas v. United States, 103 F. Supp. 543 (D.C. Mass. 1951); Lexington Hospital v. White, 245 S.W. 2d 927 (Ky. 1952); Mills v. Richardson, 137 Atl. 689 (Maine 1927); Moeller v. Hauser, 54 N.W. 2d 639 (Minn. 1952); Gilstrap v. Osteopathic Sanitarium Co., 24 S.W. 2d 249 (Missouri 1929); Broz v. Omaha Maternity and General Hospital, 148 N.W. 575, 578 (Neb. 1914); Burnham v. Stillings, 79 Atl. 987, 988 (N.H. 1911); Hannon v. Cooper Siegal Co., 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 430 (1901). *This is the leading case on the entire subject which is cited throughout the authorities.* Tulsa Hospital Assoc. v. Juby, 175 Pac. 915 (Okla.); Giusti v. C. H. Weston Co., 108 P. 2d 1010, 1013 (Ore. 1941); Sepaugh v. Methodist Hospital, 202 S.W. 2d 985 (Tenn. 1947); Edwards v. West Texas Hospital, 89 S.W. 801 (Tex. 1935); Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 157, 3 S.E. 2d 152 (1939); Jenkins v. General Hospital, 90 W. Va. 230, 235, 110 S.E. 560 (1922); Treptau et al. v. Behrens Spa, Inc., 20 N.W. 2d 108, 114, (Disc. 1945).

Co. v. Thompkins. A District Court is simply not at liberty to ignore a local lower court opinion without substantial cause and arrive at some other "conception" of the law on the basis of the merest dicta in an unrelated line of cases, particularly when the law of the lower court is consonant with the general law of the state and with practically all other respected authority. If *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, supra, means anything, it was applicable here and required the decision rendered by the Court of Appeals. As long as the Court of Appeals will recognize such principles, and control the District Courts within their jurisdiction from substituting their personal conceptions of the local law, *Swift v. Tyson,* 16 Pet. 1, surely cannot be resurrected.

The arguments advanced in the petition with reference to the alleged release and indemnity are just as easily answered. Releases and indemnity agreements must be interpreted strictly in accordance with their terms. The alleged indemnity agreement is so vague that it could not possibly be given effect as an agreement to indemnify for the liability here involved under Pennsylvania law. There is nothing about the language which could be regarded as contemplating mal-practice.[11] This is so even without relying on the familiar Pennsylvania rules that such agreements are construed strictly, both against the party drawing them and the party seeking their protection.[12] But even if the alleged indemnity

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11. The obvious intent was to indemnify for self inflicted injury or damage caused by Brown himself.

12. Metropolitan Casualty Ins. Co. of New York v. Eanks, 76 F. 2d (C.C.A. Pa. 1935); Associates Discount Corp. v. Griesinger, 103 F. Supp. 705 (D.C. Pa. 1952);

agreement expressly and particularly specified the claim here in question, it would still be ineffective. The alleged agreement was signed only by "Emma Jean Brown" the then wife of the patient. It was not signed by Brown and it was not signed by the representative of his estate, and it was not signed by the guardian of the estates of Brown's young sons, all of whom were entitled to recover, and therefore could not defeat this action.[13]

That the release was totally inapplicable is also very clear. It is expressly limited to "damages on this account". The quoted words refer directly to the administration of "recognized medical treatment, including Electro-Shock Therapy". *George Brown did not die as a result of receiving recognized medical treatment or Electro-Shock Therapy.* Had he died as a result of receiving recognized medical treatment, there would have been no mal-practice cause of action. The Court and jury has been satisfied that the treatement resulting in the damages here involved was "*un*recognized" treatment for the symptoms manifested by the patient. Thus, without again calling on the rules requiring a strict construction, this clause expressly applies only to claims other than those involved in the present litigation.

Com. to use of Herzog v. Henry W. Horst Co., 364 Pa. 403, 72 A. 2d 131 (1950); Davis v. Wilson, 166 Pa. Superior Ct. 462, 72 A. 2d 148 (1950); Manufacturers & Merchants Building Loan Ass'n. v. Willey, 321 Pa. 340, 344, 345, 183 A. 789 (1936); Camden Safe Deposit & Trust Co. v. Eavenson, 295 Pa. 357, 364, 145 A. 434 (1929); Perry v. Payne, 217 Pa. 252, 258-9, 66 A. 553, 11 L.R.A. (N.S.) 1173 (1907).

13. Donnelly v. Fred Whitaker Co. et al., 364 Pa. 387, 72 A. 2d 61.

2. The Court of Appeals ruled only on those issues which were properly before it on appeal.

There are two separate clear and complete answers to the issue which petitioners attempt to invoke under Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723C.

The first answer simply is that the Circuit Court entered its ruling in this case on the basis of its decision with respect to the theory on which the case was submitted to the jury and which, over respondent's objection, the District Court subsequently declared to be invalid. It was from this ruling that the appeal was taken to the Circuit Court. We refer again to page 11 of the opinion of the Court of Appeals (quoted at length supra, pages 11 and 12) where the Court said it was convinced that the Pennsylvania law was in accord with the proposition that despite any possibility that Dr. Kelly was an independent contractor, petitioners would be liable by reason of the representation of Kelly's status to Brown. Although the Circuit Court disagreed with the District Court on the question of whether Dr. Kelly was an independent contractor it placed its decision squarely on the Court's error in ruling on the question which had been submitted to the jury. The mere fact that the Circuit Court discussed an alternative basis for liability does not invalidate its decision on the issue which even petitioners must admit was properly before the Court.

The second answer to this part of petitioners' brief is that actually the alternate theory of petitioners' liability was probably very properly before the Court of Appeals. That alternate theory was that Dr. Kelly was

actually the petitioners' servant. Petitioners argue that respondent made no request to the District Court to instruct the jury concerning that alternate theory and consequently there could be no appeal on that question. In so arguing petitioners completely lost sight of the purpose and intent of Rule 51 which is simply to require that there be a final ruling by the lower court before an appeal can be taken. There was such a ruling in this case. At the close of respondent's case petitioners moved for a directed verdict. The Court heard argument on whether that issue should be submitted and ruled conclusively that it would not. See page 435 of the Testimony where the Court stated after strenuous argument from both sides on the point:

> "... I'm not going to submit any question of independent contractor because it is a matter of law under the undisputed evidence in this case. My opinion is that Dr. Kelly was an independent contractor."

We find it hard to conceive a more definite and final ruling by a trial court. That such a ruling is and may be deemed an adequate basis for an appeal is supported by Volume 5, Moore Federal Practice page 2502, paragraph 51.03, as follows:

> "As a general rule, requests for instructions should be in writing and a party cannot complain of the Court's failure to give instructions not so requested. Nevertheless, an oral request has been held sufficient to preserve an issue on appeal *where it was clear that the party was asserting the particular contention and that the trial court would not have given the instruction.*"[14]

14. Emphasis added. That it was made clear to the court that respondent was asserting the alternate theory and that the court would not give the instruction is established in the record (T. 435).

We have read the cases cited in footnote 11 (page 23) of petitioners' brief and note that many of them refer to the purpose of the rule being the requirement of a final and definite ruling on the point in issue. We therefore, submit that in this case the Court of Appeals, might properly, had it chosen so to do, decided the case on this question.[15] However, whether it could have properly done so or not is immaterial, since the decision was rested on a point admittedly before the Court.

3. Where, as here, the Court of Appeals was convinced that the District Court's conception of local law was erroneous, the Court of Appeals was not at liberty to abdicate its responsibility of review in deference to such erroneous conception of the law.

Examination of that reason advanced by the petition conclusively demonstrates the total invalidity of the entire petition. Even if it is assumed that a rule exists in a minority of circuits requiring the affirmance of permissible decisions on local law by district judges and that that minority rule should be adopted in the other circuits the question still remains in each case as to what constitutes a permissible conclusion by the district judge. In every instance the Court of Appeals must determine whether the conclusion reached by the district judge is actually permissible under state law.

In the instant case, the Court of Appeals has clearly stated that it was convinced that the district judge's

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15. There is even a third answer to petitioners contention. It is quite probable, that Rule 51 had no bearing whatever since the appeal was taken not on exception to the Court's erroneous instruction, but from its erroneous ruling on the motion for directed verdicts.

conception of the local law was erroneous. The Court of Appeals has not placed its decision on its own opinion of what the law *should* be, but upon its conviction concerning what the law is in Pennsylvania. See pages 9, 10 and 11 of the opinion of the Court. Note the language used. At page 9, the Court said:

> ". . . We are of the opinion that the Supreme Court of Pennsylvania would hold . . ."
>
> ". . . Conversely we do not see how a 'Medical Director' engaged as under the circumstances at bar, can be an independent contractor and the doctrine of the independent contractor seems completely inapplicable under the facts of the case at bar."

At page 10 the Court went on to say:

> ". . . there is another cogent factor which we think *would compel* the Courts of Pennsylvania to hold the defendants liable in the case at bar.
>
> ". . . *We are of the opinion that . . . the Courts of Pennsylvania would apply the doctrine of respondeat superior* . . ." (Emphasis added)

Thus, it is unequivocally stated that the Circuit Court was not making its ruling on the basis of what it thought the law should be but solely on the basis of what the Pennsylvania law is.

As previously noted, the conviction of the Court of Appeals with respect to the Pennsylvania law was not arrived at lightly, but upon the sound foundation of a well reasoned lower court opinion that was in accord with all available appellate data. Those decisions had not been adequately treated by the District Court. Under

such circumstances, it would have been clear error for the Court to abdicate its duty of reviewing the conclusions of the trial court and substituting the views of the trial judge for its own conviction concerning local law.

Even those circuits allegedly following the minority rule contended for by petitioners, tacitly admit that under such circumstances as were here presented the Court of Appeals had no alternative but to reverse the judgment of the trial court. Examination shows that the effect of those cases cited by petitioners as announcing the minority rule, are greatly weakened by the fact that the appellate court paying lip service to the rule, actually agreed with the trial court's conclusions concerning local law. See for example *Mast v. Illinois Central R. Co.*, 176 F. 26 157, 163 (C.A. 8) where the Court said:

> ". . . Our study of the Iowa cases has convinced us that the challenged rulings of the trial judge are in accord with Iowa law."

See also *Heikes v. New York Life Ins. Co.*, 171 F. 2d 460, 464 (C.A.8) which states:

> "In this case we think the District Court reached not only a permissible, but a correct conclusion."

The other cases relied on, for the most part at least, contain similar statements indicating only adherence to the minority rule where the appellate court agrees with the trial court's conclusions. Certainly none of them indicate that such a procedure should be followed where, as here, the Court of Appeals regards the conclusion of the trial judge as clearly erroneous.

4. There was complete diversity of citizenship between the plaintiff and all of the defendants against whom she proceeded and the Court below very properly ruled that Federal Court jurisdiction did exist.

Respondent, a citizen of Pennsylvania, sued four individuals all of whom were citizens of states other than Pennsylvania. Those four individuals were owners of a business enterprise which was operated, according to their representations, as a partnership. Respondent did not sue the partnership itself or any owner who was a resident or citizen of Pennsylvania. The Complaint and all other papers filed in this action up to and including the present petition shows that no judgment was claimed or could have been entered in respondent's behalf against anyone other than the four persons whom she has sued. The mere fact that the individuals sued might be partners does not under Pennsylvania law make the partnership itself a party to the action. In Pennsylvania the individual partner and the partnership itself are each considered separate and distinct jural entities: Pennsylvania Uniform Partnership Act of 1915 P.L. 18, 59 P.S. section 1, et seq. Rule 2128 (a) of the Pennsylvania Rules and Civil Procedure; 2 Goodrich-Amran, Civil Practice, Section 2128 (a) —1.

Under Section 37 (a) of the Uniform Partnership Act as adopted in Pennsylvania, the tort liability of partners may at the election of the plaintiff be treated as several and not joint. By naming as defendant only certain of the owners and omitting to name the others and the partnership itself, plaintiff clearly elected to proceed, in accordance with that act, solely on the basis of the individual liability of those parties named.

Under this Pennsylvania law it has long been recognized that neither the partnership entity nor all individual partners are necessary or essential parties to an action ex delicto versus other individual partners: *Baxter v. Wunder*, 89 Pa. Superior Court 585, (1926). There the Court held that the partners were liable severally and that the plaintiff if he elected, could sue any one or more of the individuals and ignore the others. That is exactly what was done here as the record plainly demonstrates. How other actualities can be referred to when no judgment has been rendered or could be rendered against any individual or entity other than those sued completely escapes us.

This self-same procedure has been followed and approved in other federal court cases governed by the Uniform Act. The very cases cited by petitioners so state. See *Darby v. Philadelphia Transp. Co.*, 73 F. Supp. 522, 523 (E.D. Pa.) where the court said:

> "... the plaintiff has the option of naming any of the members of the partnership, or the partnership entity, as the defendant, or may join any combination of partners and the partnership entity as defendants, the partnership itself being recognized as an entity, separate and distinct from its members ..."

Thus, the petitioners own case destroys their argument. The fact that in that case the plaintiff did name the partnership entity which had local citizenship and thus destroyed the necessary diversity of citizenship does not alter the clear import of the opinion. In the present case the plaintiff did not name the partnership as a party and its domicile is therefore immaterial.

Exactly the same thing is true of the other case cited by petitioners: *Remington's Dairy v. Rutland Ry. Corp.*, 15 F.R.D. 489, 20 F.R.S. 251 (D. Vt.) There the plaintiff itself was a partnership entity and its domicile was determinative of the citizenship question.

In *Weaver v. Marcus et al.*, 165 F. 2d 862 (C.A.4) (1948), is clear authority for the position taken by respondent and the district and appellate judges in this case. In that case, the plaintiff had actually designated the defendants individually and as co-partners trading and doing business as "Marcus Brothers". Yet at page 866 the Court stated:

> "The Court in its discretion may proceed in an action without making such persons parties if . . . their joinder would deprive the Court of jurisdiction of the parties before it; . . " .

See also the authorities cited in that opinion including *Soberg v. Sanders*, 243 Mich. 429, 220 N.W. 781; *Mechems Elements of Partnership* (2d Ed. 1920) Section 312, pages 276, 277; and *Crane on Partnership* (1938) 276.

This problem was completely dealt with in the instant case by the District Court, its opinion being reported as *Brown v. Ingraham*, 11 F.R.D. 522 (W.D. Pa. 1951). There have been no cases cited by petitioners or discovered by respondent which hold to the contrary.

It is most significant to note that despite the fact that plaintiff never named the partnership itself as a party, the petitioners now speak of the actualities of the litigation. We note that in a brief filed in the District Court on June 16, 1953, this same counsel for petitioners stated (page 3):

"In this particular case, the subject matter of the pending action is *the alleged negligence of the defendants as individuals* in their ownership and operation of the Mercer Sanitarium. *There is no allegation made against any of the defendants as possible partners. The defendants have been sued only as individuals. A partnership is not mentioned in either the Complaint or the Amended Complaint.* (Emphasis added)

This observation was made nearly three years after the action was filed. Now, however, petitioners choose to change the pleadings and their interpretation of the pleadings and say that action was brought against additional parties.

The averment that no harm would result to respondent or her children if this action were terminated to her prejudice seems entirely inappropriate to the present considerations. In reply we, therefore, merely say that the state action was filed as a cautionary measure after a suit was first filed in the federal court, and that when the state action was called for trial, respondent in accordance with Pennsylvania law, elected to take a voluntary non-suit which the Court of Mercer County, contrary to law refused to enter.

CONCLUSION

The only questions or issues raised by the entire petition actually are, despite feverish efforts to make them something more, merely questions of local law. Those questions of local law have been decided by the Court of Appeals, and in most instances also by the District Court, completely in accord with the Pennsylvania authorities in the exact manner established and prescribed by this Court. Petitioners only real quarrel on each and every issue attempted to be raised is solely with the law of Pennsylvania as it clearly exists.

This Court should, therefore, put an end to this protracted litigation by denying the Writ requested and remanding the case so that judgment may finally be entered in behalf of respondent and her sons in accordance with the jury's verdicts.

Respectfully submitted,

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